(1)

02 826 NOV 26 2002

No. _____

IN THE

Supreme Court of the United States

IN THE MATTER OF JOHN P. COALE,
Petitioner.

Petition for a Writ of Certiorari to the Supreme Court of Indiana

---

PETITION FOR A WRIT OF CERTIORARI

DIANE E. COOLEY *
818 Connecticut Avenue, N.W.
Suite 857
Washington, D.C. 20006
(202) 887-4770

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

99 pp

QUESTIONS PRESENTED

1. Whether a State may properly exercise jurisdiction in a disciplinary action against an attorney who is not admitted to the bar of the State, not admitted to any court in the State on a *pro hac vice* basis, has not participated in a pending legal proceeding in the State, has not dispensed legal advice or otherwise acted as an adviser or counselor to a prospective or actual client in the State, and, where no private citizen of the State has filed a complaint of misconduct against the attorney.

2. Whether the Due Process guarantee of a neutral tribunal is violated when members of the court that renders the final decision in a disciplinary proceeding hold a press conference prior to judging the merits of the proceeding, for the purpose of commenting publicly, and in a disparaging manner, on the conduct at issue in the proceeding

3. Whether an attorney can be found guilty of violating the rules of professional conduct of a state bar to which he is not admitted when there is no evidence that the attorney engaged in the practice of law in the state or had any contact with a resident of the state.

Rule 14.1(b) Statement

Pursuant to Supreme Court Rule 14.1(b), petitioner states that, in addition to John P. Coale, petitioner here (respondent below), Phillip B. Allen was a respondent below. The Indiana Disciplinary Commission was the complainant below and is the respondent herein.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 14.1(b) STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	13
I. THE JUDGMENT OF THE INDIANA SUPREME COURT WAS RENDERED IN THE ABSENCE OF PERSONAL AND SUBJECT MATTER JURISDICTION AND IS VOID	14
II. THE INDIANA SUPREME COURT COULD NOT AND DID NOT CONSTITUTE THE NEUTRAL TRIBUNAL DUE PROCESS DEMANDS	18
III. THE DECISION OF THE INDIANA SUPREME COURT IS CLEARLY ERRONEOUS	23

TABLE OF CONTENTS—Continued

Page

A. There Was No Evidence That Petitioner Violated the Indiana Rules of Professional Conduct Because There Was No Evidence That Any Indiana Resident Received Petitioner's Brochure 24

B. The Evidence Failed to Prove Petitioner Performed Any Act that Gave Rise to the Allegations of the Complaint 27

C. The Evidence Failed to Establish That Petitioner's Brochure Required a Designation as "Advertising Materials" 28

D. The Court Violated Petitioner's Right to Due Process by Intentionally Ignoring His Arguments on the Evidence 29

TABLE OF AUTHORITIES

CASES — Page

Bracy v. Gramley, 520 U.S. 899 (1997) 23
Brokemond v. Marshall Field & Co., 612 N.E.2d 143 (Ind. App. 1993)..... 16
Burger King v. Rudzewicz, 471 U.S. 462 (1985)... 15
Chesapeake & O.Ry.O v. Martin, 283 U.S. 209, 216 (1931)..... 27
In re Moore, 453 N.E.2d 971 (Ind. 1983)..... 18, 19
In re Murchison, 349 U.S. 133 (1955).....18, 20, 22
International Shoe Co. v. Washington, 326 U.S. 310 (1945)..... 14
Lidetky v. United States, 510 U.S. 540 (1994)..... 22
Marshall v. Jerrico, Inc., 446 U.S. 238 (1980)..... 18, 23
Mathews v. Eldridge, 424 U.S. 319, 333 (1976).... 29
Mayberry v. Pennsylvania, 400 U.S. 455 (1971)... 18
Miller v. Industrial Hardwoods Corp., 775 N.E.2d 1168 (Ind. App. 2002) 30
Offut v. United States, 348 U.S. 11 (1954) 18
Rosowsky v. University of Colorado, 653 N.E.2d 146 (Ind. App. 1995)..... 16
Withrow v. Larkin, 421 U.S. 35 (1975)..... 20
World-wide Volkswagen v. Woodson, 444 U.S. 286, 291 (1980)..... 14, 17

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. Amend. XIV ..... *passim*
Ind. Rule Tr. 4.4 (West 1993)..... 15
Ind. R.P.C. 7.1 (West 1992)..... 8, 11
Ind. R.P.C. 7.3 (West 1992).....8, 11, 28, 29
Ind. R.P.C. 8.4 (West 1992)..... 11
Ind. Rule A.D. 23 (West 1993)..... 3, 9

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Hearing Officer finding a violation of the Indiana Rules of Professional Conduct by petitioner is unreported and reproduced at App. 12a-17a. The opinion of the Indiana Supreme Court affirming the decision of the Hearing Officer is reported at 775 N.E.2d 1079 (Ind. 2002) and reproduced at App. 1a-11a.

JURISDICTION

The Indiana Supreme Court entered its judgment on July 29, 2002. App. 1a. On October 17, 2002, Justice Stevens extended the time within which to file a petition for writ of certiorari to November 27, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const., Art. XIV, § 1.

Admission and Discipline Rule 23 of the Indiana Rules of Admission and Discipline is reproduced, in pertinent part, at App. 28a-39a.

Rule 7.1 of the Indiana Rules of Professional Conduct is reproduced at App. 24a-25a.

Rule 7.3 of the Indiana Rules of Professional Conduct is reproduced at App. 26a.

Rule 8.4 of the Indiana Rules of Professional Conduct is reproduced at App. 27a.

Trial Rule 4.4 of the Indiana Rules of Civil Procedure is reproduced at App. 40a-41a.

STATEMENT OF THE CASE

1. *Introduction*

In 1993 petitioner, a Washington, D.C. attorney, found himself the subject of a disciplinary proceeding in Indiana, where he had never been admitted to the bar or sought admission *pro hac vice* and where he had never practiced law. Petitioner found himself defending this proceeding before a court where, prior to judging the merits of the case, two of the five justices (one of whom was the Chief Justice) had held a press conference for the express purpose of publicly condemning the very conduct (i.e. direct mail solicitation) at issue in the proceeding.

The charge against petitioner was that his firm's brochure violated the Indiana Rules of Professional Conduct in three ways: 1) it contained certain types of prohibited statements; 2) it was not imprinted with the words "Advertising Materials," and; 3) it was not filed with the Indiana Disciplinary Commission prior to its dissemination.

The disciplinary proceedings against petitioner inexplicably lasted nine years. During that time, petitioner raised constitutional, legal and procedural challenges to the proceedings. The Indiana Supreme Court, at every turn, summarily rejected petitioner's arguments and constitutional challenges or simply declined to consider them at all. Moreover, when it appeared that respondent, the Indiana Disciplinary Commission, was losing its case against petitioner the Indiana Supreme Court stepped in, *sua sponte*, to assist respondent with its arguments and the presentation of its case and to waive its own rules for the benefit of respondent.

Despite having nine years within which to develop its case, the Indiana Disciplinary Commission, never adduced any evidence to prove petitioner contacted any citizen of the State of Indiana. Indeed, respondent never proved that

petitioner took any action whatsoever or that the Indiana Rules of Professional Conduct even applied to petitioner's brochure.

Even with this complete failure of the evidence, petitioner was found guilty of violating Indiana's Rules of Professional Conduct concerning attorney advertising and was disciplined by the Indiana Supreme Court. In the process of reaching this conclusion the Indiana Supreme Court simply ignored dispositive evidentiary issues raised and fully briefed by petitioner: no mention of them was made at all. The Indiana Supreme Court even went so far as to disregard, in its entirety, petitioner's timely submission to the hearing officer on the grounds that it was not "file stamped." Although the hearing officer stated in his opinion that he had read petitioner's submission, the court ignored this fact, stating, "the chronological case summary does not indicate that that document was ever filed before the hearing officer." In this way, the court was able to avoid reaching the merits of petitioner's arguments, which would have disposed of the matter favorably to petitioner.

As a result of the discipline imposed on him, petitioner is "barred from acts constituting the practice of law" in Indiana.

2. *The Procedure Governing Attorney Disciplinary Actions in Indiana*

In Indiana, disciplinary actions are conducted in accordance with the Admission and Discipline Rules and are presided over by the Indiana Supreme Court. The Indiana Supreme Court "has exclusive jurisdiction of all cases in which an attorney who is admitted to the bar of this court or who practices law in the state . . . is charged with misconduct." App. 28a [1] The Disciplinary Commission, a

---

[1] The complaint against petitioner was filed in 1993 and was based upon conduct alleged to have occurred in 1992. The relevant rule of procedure is the 1993 version of Admission and Discipline Rule 23, while the relevant Rules of Professional Conduct are those of 1992.

regulatory arm of the Supreme Court, is charged with investigating and prosecuting attorney grievances.

Once a complaint is filed against an attorney, the Indiana Supreme Court appoints a hearing officer to preside over the disciplinary hearing. The hearing officer is the functional equivalent of a trial court judge. The adjudicative stage of the proceedings then ordinarily begins with an adversarial hearing before the hearing officer; however, the parties may dispense with the hearing by agreement and submit the matter to the hearing officer for a decision on a stipulated record. After the hearing, or, if a hearing has been waived, after the paper submissions of the parties, the hearing officer "shall determine whether misconduct has been proven by clear and convincing evidence and shall submit to the Supreme Court written findings of fact." App. 37a.

The appellate stage of the disciplinary proceedings begins when either the charged attorney or the Commission files with the Indiana Supreme Court a petition for review of the hearing officer's findings or recommendations. App. 38a. After a *de novo* review of the record of the proceedings, the Supreme Court may either adopt the findings and recommendations submitted by the hearing officer or issue its own findings and discipline.

3. *The Events Leading Up to this Case*

In February of 1992 a Kentucky Air National Guard cargo plane crashed in Evansville, Indiana (the "Evansville crash") resulting in death, injury and property damage. Shortly after the Evansville crash, Indiana Supreme Court Chief Justice Randall Shepard and Associate Justice Brent Dickson held a press conference, the purpose of which was to comment upon and call for an investigation into "advertising and solicitation practices [following the Evansville crash] which they perceived as improper." App. 6a-7a. During that press conference, the justices harshly criticized the targeted solicitation of victims of the Evansville crash and called upon the Indiana

Disciplinary Commission to take "firm action" and an "aggressive posture" towards such conduct.

In response to the March 9, 1992 press conference and the request of the Indiana Supreme Court, the Indiana Disciplinary Commission (the "Commission" or "respondent") filed a grievance against petitioner. Respondent pursued its own grievance because none of the private citizens who allegedly had been subjected to these advertising and solicitation practices filed a grievance.

On March 8, 1993 respondent filed a "Verified Complaint for Disciplinary Action and in the Alternative Verified Petition to Enjoin the Unauthorized Practice of Law" (the "complaint") against petitioner. At issue in the complaint was a brochure containing information about petitioner's Washington, D.C. law firm. The complaint alleged that the brochure in question was in violation of the Indiana Rules of Professional Conduct because it contained statements prohibited by the Rules of Professional Conduct, did not bear the words "Advertising Materials," and had not been filed with the Disciplinary Commission.

According to the complaint, five individuals, alleged to be survivors, or families of deceased victims, of the Evansville crash, received the brochure about petitioner's law firm. None of the five individuals were identified as residents of the State of Indiana.

Petitioner is a Washington, D.C. attorney. Petitioner has never been admitted to the Indiana bar, sought admission *pro hac vice* or otherwise practiced law in Indiana. However, in the complaint it was alleged that petitioner violated the Indiana Rules of Professional Conduct or, in the alternative, engaged in the unauthorized practice of law in Indiana.

An answer to the complaint was filed on behalf of petitioner.[2] In the answer it was admitted that a brochure about petitioner's firm was sent to the five named individuals but it was denied that the Indiana Rules of Professional Conduct were applicable. The answer also raised First Amendment and other challenges to the Rules and the proceedings.

4. *The Pre-Hearing Proceedings*

On June 6, 1993 the Indiana Supreme Court issued an "Order Advising Parties of Intended Procedure" in petitioner's case. App. 18a. The court's order indicated it would first consider the issue of jurisdiction over petitioner and, assuming the propriety of jurisdiction, would proceed to appoint a hearing officer to adjudicate the charges against petitioner. App. 18a.

Petitioner promptly filed an objection to the court's intended procedure and a motion to dismiss the charges against him on the grounds that the Indiana Supreme Court could not impartially preside over the controversy. Petitioner argued that the court, through its Chief Justice and an associate justice, publicly had expressed a negative opinion about the conduct at issue, infecting the proceedings with bias. Petitioner's unopposed motion was summarily denied.[3] The charges were not dismissed, nor did the two justices recuse themselves from hearing petitioner's case. App. 19a.

After summarily concluding that it had both subject matter and personal jurisdiction over petitioner,[4] on February 4,

---

[2] This action was brought against petitioner and his former law partner, Phillip Allen. This petition for certiorari is brought only on behalf of John P. Coale.

[3] The court ruled, without elaboration, that the Canons 2 and 3 of the Code of Judicial Conduct did not require disqualification.

[4] Respondent filed complaints of misconduct against two other out-of-state attorneys in connection with the events surrounding the Evansville crash. One of those attorneys, Gerald Sterns, filed a motion to dismiss for lack of subject matter and personal jurisdiction. It was generally agreed,

1994 the Indiana Supreme Court appointed Hon. Jeffrey Eggers as hearing officer to preside over the proceedings against petitioner. Shortly after his appointment, Judge Eggers left the bench for private practice; however, he continued to serve as the hearing officer until the conclusion of these proceedings in 2002.

On January 12, 2001, a pre-hearing conference was held before the hearing officer, at which time respondent expressed its intention to forego the introduction of evidence and to rest its case against petitioner on the complaint and the answer. In view of respondent's decision not to introduce new evidence in support of the charges, petitioner also elected not to introduce new evidence in his defense. It was further agreed that both parties would forego oral argument and, in lieu thereof, would submit to the hearing officer briefs arguing the evidence and the law and setting forth proposed findings and conclusions. App. 21a.

5. *The Hearing on the Charges*

On March 23, 2001, the respondent served on petitioner and the hearing officer its "Recitation of Admissions in Lieu of Final Hearing" and "Commission's Brief." Respondent's papers were not filed with the court but, rather, were sent to the law office of the hearing officer. On April 7, 2001 petitioner served his Brief in Opposition to the Charges. Like respondent, petitioner did not file his opposition with the court but sent it to the law office of the hearing officer. At this phase of the proceeding, the fact-finding before the hearing officer, the parties were not required by rule or order to file their briefs with the Indiana Supreme Court and it was their mutual understanding that service upon the hearing

---

as implied by the Order Advising Parties of Intended Procedure, the outcome of Sterns' motion would dispose of the jurisdictional issues in petitioner's case. On October 29, 1993 the Indiana Supreme Court summarily denied that motion, citing no legal authority.

officer was sufficient to preserve their arguments for later presentation to the Indiana Supreme Court, if necessary.

In his Opposition to the Charges petitioner made several arguments why judgment should be in his favor. Petitioner argued: 1) the Indiana Supreme Court and the Disciplinary Commission lacked jurisdiction to conduct disciplinary proceedings against petitioner; 2) petitioner was deprived of due process by the bias of the Indiana Supreme Court; 3) the Indiana Rules of Professional Conduct violate the First Amendment; 4) the evidence (i.e. the complaint and the answer) failed to prove that petitioner engaged in any misconduct or in fact did anything; 5) the evidence failed to establish that any of the five individuals named in the complaint were residents of Indiana; 6) the evidence failed to establish that petitioner had no prior relationship with the five named individuals, a prerequisite for the applicability of Rule 7.3 (c) (App. 26a); and, 7) pursuant to Rule 7.1(e), petitioner's brochure did not require an "advertising materials" designation because it was apparent from the context that it was an advertisement (App. 25a). On April 25, 2001 respondent served its reply brief, addressing only the arguments on jurisdiction and the First Amendment.

On June 19, 2001 the hearing officer submitted to the Indiana Supreme Court his findings, conclusions and ruling. In his opinion, the hearing officer expressly acknowledged having received the parties' submissions, including petitioner's brief. On the specific charges, the hearing officer concluded the words "advertising materials" did not appear on the brochure about petitioner's law firm, the brochure contained "self-laudatory" statements and "endorsements or testimonials," and the brochure had not been submitted to the Disciplinary Commission at or prior to dissemination. The hearing officer also concluded that this conduct was "prejudicial to the administration of justice." The hearing officer did not find petitioner guilty of the unauthorized practice of law.

The hearing officer did not consider, and failed to pass upon several of petitioner's arguments, including petitioner's evidentiary arguments. While the hearing officer stated that petitioner "directed solicitation directly to residents of the State of Indiana," he provided no citation to the record evidence to support this statement, nor did he provide a basis for this unsupported conclusion. App. 13a. Of petitioner's remaining evidentiary arguments no mention was made.

6. *The Appeal to the Indiana Supreme Court*

On July 18, 2001 petitioner filed a timely petition with the Indiana Supreme Court seeking review of the hearing officer's findings and recommendations. In his petition for review, petitioner reargued all seven matters previously raised before the hearing officer.

Pursuant to Admission and Discipline Rule 23, respondent had thirty days within which to file a response to petition for review. App. 39a. Seven months later, respondent still had made no filing. Rather than rule upon petitioner's *uncontested* request for review of the hearing officer's findings, on February 18, 2002 the Indiana Supreme Court *sua sponte* issued an order concerning petitioner's request for review.

The February 18th order directed the Disciplinary Commission to respond, six months out of time, to petitioner's filing. The court indicated that respondent should focus its response on the issue of the evidence and whether it had been proven that citizens of Indiana received petitioner's brochure. With regard to this issue, the court, erroneously stated it was raised for the first time on appeal and directed the parties to "show cause why the record should or should not be reopened for the presentation of evidence as to the jurisdictional issue." App. 22a-23a. With the disciplinary proceedings against petitioner concluded and findings of fact issued, the one court with the power to review that judgment suggested that, somehow, the record could be reopened to enable one party,

the Disciplinary Commission, to introduce new evidence essential to its case. Rather than decide the case on the record evidence, the court sought to have the record altered and then decide the matter.

On May 1, 2002, in conformance with the February 18, 2002 order, the Disciplinary Commission responded to petitioner's request for review. The sole argument presented by the response was that, at the commencement of the proceedings in 1993, petitioner failed to allege in his answer that the five named individuals were not citizens of the state of Indiana. Acknowledging that the rules of procedure for disciplinary actions do not require the assertion of affirmative defenses, respondent nevertheless argued that petitioner had an obligation to raise the issue as an affirmative defense. Respondent also requested, as per the suggestion of the court, the re-opening of the proceedings to allow the introduction of evidence on this one point.

On May 15, 2002 petitioner filed a timely reply brief and an objection to the February 18, 2002 order. Petitioner argued, *inter alia*, that the failure to prove petitioner had communicated in any way with a citizen of Indiana *was* properly raised before the hearing officer, during the adjudicative phase of the proceedings and, therefore, the issue was preserved for appeal. In support of this argument, petitioner attached a copy of his brief in opposition to the charges, which had been submitted to the hearing officer, and pointed out the pages on which this argument was raised. Petitioner also strenuously objected to the suggestion that a court of appeals could re-open a concluded lower-court proceeding for the purpose of allowing one party to adduce new evidence and argued that to do so would violate the Due Process Clause. Petitioner asserted that the outrageousness of the court's "show cause" order reflected its bias against petitioner and requested recusal of Chief Justice Shepard and Justice Dickson.

On July 29, 2002 the Indiana Supreme Court issued its order finding petitioner guilty of misconduct. Specifically, the court found: petitioner failed to include the words "advertising material" on his firm's brochure in violation of Indiana Rule of Professional Conduct 7.3(c); the brochure contained "self-laudatory" statements and "endorsements" in violation of Rules 7.1(b) and 7.1(d)(2), respectively; and, the foregoing conduct was "prejudicial to the administration of justice" in violation of Rule 8.4(d). The court, like the hearing officer before it, did not find that petitioner had engaged in the unauthorized practice of law.

In its opinion, the Indiana Supreme Court first held that it had jurisdiction over petitioner. The court reasoned, "any acts which [petitioner took] in Indiana that constitute the practice of law are subject to our exclusive jurisdiction to regulate professional legal activity in this state . . . By directing the solicitations to the prospective clients [petitioner] communicated to those persons that [he] was available to act in a representative capacity for them in Indiana . . . Those acts constituted professional legal activity in this state subject to our regulatory authority." App. 4a. However, the court did not go on to find that petitioner had in fact engaged in the practice of law in Indiana.

After finding jurisdiction was proper, the court considered petitioner's argument that the evidence failed to prove that Indiana residents received petitioner's brochure. On this issue, the court, despite the record, found, "At the fact finding stage of these proceedings, [petitioner] never argued that the targets of the solicitations were not specifically proven to be Indiana residents." App. 5a. The court reached this conclusion by refusing to consider petitioner's brief that had been submitted to the hearing officer because it found no indication that "the document was ever filed before the hearing officer." App. 5a, n.3. The court made no effort to square this reasoning with the opening paragraph of the hearing officer's written opinion, which expressly states that the hearing

officer's findings were made "having received [petitioner's] brief." App. 12a. With petitioner's brief out of the way, the court concluded, with no citation or reference to the record, "the record in this case is sufficient to support the inference that the targets of respondents' solicitations were Indiana residents." App. 5a.

The second, and only other evidentiary issue addressed by the court was petitioner's contention that the evidence failed to prove that petitioner actually did anything. Petitioner and his former partner were charged together in the complaint, which made no effort to specify or separate the acts of petitioner from those of Allen but rather, framed all allegations as to both lawyers. No evidence was later adduced to prove petitioner, as opposed to Allen, performed any of the acts giving rise to the charges. Petitioner argued that under the circumstances to find him guilty would require the imposition of "vicarious" discipline. In response, the court held "[e]ven assuming *arguendo* that Coale was not directly responsible for the dissemination of the solicitations, [he] is responsible for another lawyer's acts *if* [he] ratified the conduct involved or timely knew of conduct taken by a lawyer over whom he had direct supervisory authority and failed to take reasonable remedial action." App. 6a. (emphasis added). However, the court then made no finding that petitioner ratified or knew of any conduct that gave rise to the charges.

The final issue the court chose to address was petitioner's bias argument and the refusal of Chief Justice Shepard and Justice Dickson to recuse themselves. The court admitted that the two justices held a press conference to discuss advertising and solicitation practices "they perceived as improper." App. 7a. However, the court held that no bias was present because "this Court did not direct the filing of a formal grievance against [petitioner] here but merely called for an investigation into solicitation practices following the airplane crash." App. 7a.

The Indiana Supreme Court, like the hearing officer before, failed or refused to consider all of petitioner's remaining arguments.

REASONS FOR GRANTING THE PETITION

Courts have an unflagging obligation to ensure that every litigant, however unpopular, receives a fair hearing before a neutral tribunal. This responsibility is all the more pressing when the tribunal in question is the highest court of the state and, therefore, one from which no appeal lies, save to this Court. The Indiana Supreme Court utterly failed to fulfill that obligation in this case.

This case was plagued with irregularities and constitutional infirmities from the outset. The most basic requirements of due process—a valid exercise of personal jurisdiction, a neutral tribunal, and a meaningful opportunity to be heard—all were absent from this proceeding. What was present was a court, with a clearly expressed point of view, improperly subjecting a non-resident defendant to its jurisdiction and then adjudicating his rights with no regard for the facts or the law. A judgment rendered under these circumstances should not stand; only this Court can ensure that it does not.

The boundaries of due process are necessary restraints on the power of courts. When the highest court of a state refuses to recognize any constitutional check, or other legal limit, on its authority it becomes a threat to, rather than a guardian of, Due Process. This Court has often acted to enforce principles that are essential to public confidence in the judicial system. In so doing, the Court has not hesitated to accept review of cases implicating the right to impartial adjudication or those dealing with the constitutional limits of a state's authority. The Court should do so again here.

I. THE JUDGMENT OF THE INDIANA SUPREME COURT WAS RENDERED IN THE ABSENCE OF PERSONAL AND SUBJECT MATTER JURISDICTION AND IS VOID

For a state court to exercise personal jurisdiction over a non-consenting defendant, two conditions must be met: (1) the applicable state long-arm statute must authorize the assertion of jurisdiction and (2) the exercise of jurisdiction must not violate due process. Neither of these conditions was met here.

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-wide Volkswagen v. Woodson*, 444 U.S. 286, 291 (1980). The exercise of personal jurisdiction over a nonresident defendant comports with due process only when "minimum contacts" exist between the defendant and the forum. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). "A judgment rendered in violation of due process is void in the rendering state and is not entitled to full faith and credit elsewhere." *World-wide Volkswagen v. Woodson*, 444 U.S. at 291.

The Indiana Supreme Court's exercise of jurisdiction over petitioner did not comport with the Due Process Clause because the constitutionally required minimum contacts were not present. The allegations of the complaint were facially insufficient to support the exercise of jurisdiction and the evidence never proved the existence of a single contact between petitioner and the State of Indiana. All that was alleged and proven was that a brochure about petitioner's firm was sent to five named individuals. It was neither alleged nor proven that the individuals were from Indiana. There was no allegation or evidence that petitioner practiced law in Indiana, went to Indiana, called Indiana, or took any action whatsoever in or related to the State of Indiana. Under

the circumstances, there were not minimum contacts; indeed, there were no contacts, between petitioner and the State of Indiana.

Even if it were assumed, as it was by the Indiana Supreme Court and the hearing officer, that the five people identified as recipients of petitioner's brochure were from Indiana—an assumption that has no evidentiary basis—minimum contacts sufficient to support a valid exercise of jurisdiction still would not exist. A non-resident subjects himself to the specific jurisdiction[5] of a state only when his forum-related activities are "significant" and create a "substantial connection" with the forum. *Burger King v. Rudzewicz*, 471 U.S. 462, 473-474 (1985). The one-time sending of five brochures into the forum, without more, cannot create the substantial connection needed to subject petitioner to the jurisdiction of an Indiana court.

If the Indiana Supreme Court could exercise personal jurisdiction over petitioner without offending due process, it could not do so consistent with the Indiana's long-arm statute, Trial Rule 4.4, which sets forth the seven activities of a non-resident defendant that can serve as a basis upon which specific jurisdiction may be exercised. App. 40a. Six of these activities are facially inapplicable to the allegations against petitioner; the seventh, which confers jurisdiction over a non-resident based on his "doing any business" in Indiana is inapplicable as a matter of fact and law.

It was alleged that petitioner's law firm sent 5 letters, and enclosures, to certain named persons and that such letters and enclosures constituted "advertising materials." There is no allegation that petitioner or his firm actually obtained any business as a result of the mailings or otherwise engaged in any business dealings in the state or with citizens of the state.

---

[5] Because there is no conceivable basis for general jurisdiction, petitioner confines his arguments to specific jurisdiction.

The law of Indiana is clear that, even when directed towards its citizens, such limited activity related to the forum is insufficient to support the exercise of long-arm jurisdiction. *See e.g. Rosowsky v. University of Colorado*, 653 N.E.2d 146 (Ind. App. 1995)(interstate letters and phone calls do not subject non-resident to jurisdiction in the state of the person receiving letters and calls). *See also Brokemond v. Marshall Field & Co.*, 612 N.E.2d 143 (Ind. App. 1993) (advertising in Indiana, delivering merchandise to Indiana, collecting state sales tax, and distributing credit cards within Indiana insufficient to confer jurisdiction upon Indiana court).

Not only did the Indiana Supreme Court lack personal jurisdiction over petitioner, it also lacked subject matter jurisdiction over the controversy. With regard to disciplinary proceedings, the Indiana Supreme Court "has exclusive jurisdiction of all cases in which an attorney who is admitted to the bar of [the] court or who practices law in the state . . . is charged with misconduct." App. 28a. It is undisputed that petitioner is not admitted to the bar of the State of Indiana and the record is devoid of any evidence that he ever appeared before any Indiana court or otherwise practiced law in Indiana. Despite the court's bald, unsupported assertions to the contrary, the sending of five brochures clearly is not the "practice of law." By its own statutory scheme, the Indiana Supreme Court lacked jurisdiction over this matter.

In an effort to circumvent the clear limits of its subject matter jurisdiction, the court reasoned that petitioner's brochure "communicated to [the recipients] that [petitioner and Allen] were available to act in a representative capacity for them in Indiana courts...Those acts constituted professional legal activity in this state subject to our regulatory authority." App. 4a. The court's proffered basis for exercising jurisdiction over petitioner is internally inconsistent and flawed.

At the outset, the court premises its assertion of subject matter jurisdiction upon acts taken "in Indiana that constitute

the practice of law" (App. 4a); however, the sending of a brochure hardly constitutes the practice of law in Indiana or anyplace else. The portions of the brochure quoted in the complaint reflect no legal advice or discussion of the law at all. Moreover, although he was charged, petitioner was not found guilty of the unauthorized practice of law. The court's conclusion that petitioner's brochure constituted the practice law in Indiana, and therefore conferred subject matter jurisdiction on the court, is unsupported and conflicts with its own conclusion that petitioner was not guilty of the unauthorized practice of law.

The second faulty premise in the court's reasoning is that by allegedly sending brochures to people in Indiana, petitioner held himself out as an attorney who could represent them in Indiana courts. The complaint alleged no statement by petitioner that could give rise to this inference. Moreover, in view of the nature of the legal issues confronted by these five people, there is nothing that would require their claims to be heard in Indiana. The Evansville crash involved a plane and a pilot that took off from Kentucky and was owned by the federal government. Like many aviation disasters, it gave rise to a dispute implicating the interests of different states and the federal government.

The court's analysis of its subject matter jurisdiction is without foundation in the law of Indiana or the facts of this case. What the court fails to address, and what it cannot escape, is the limited grant of authority contained in the Indiana Rules of Admission and Discipline.

The Indiana Supreme Court was without jurisdiction over the person of petitioner and over the subject of the proceedings. When it presided over the matter and imposed discipline on petitioner, the court exceeded its authority as defined by state and federal constitutional law, violating petitioner's due process rights and "reach[ing] out beyond the limits imposed on [states] by their status as coequal

sovereigns in a federal system." *World-wide Volkswagen v. Woodson*, 444 U.S. at 292. Review by this Court is necessary to cure this flagrant constitutional violation.

II. THE INDIANA SUPREME COURT COULD NOT AND DID NOT CONSTITUTE THE NEUTRAL TRIBUNAL DUE PROCESS DEMANDS

No proposition is more firmly established than that due process requires a neutral decision-maker, free from prejudgment or bias. As expressed by this Court, "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). This basic requirement mandates a tribunal impartial in fact and appearance. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

The requirement of a neutral tribunal means "no man is permitted to try cases where he has an interest in the outcome." *In Re Murchison*, 349 U.S. at 136. This Court has never characterized, or limited, the nature of self-interest that will serve to constitutionally disqualify a judge but rather, has recognized "that interest cannot be defined with precision." *Id.* In each case, "[c]ircumstances and relationships must be considered." *Id.* Personal feelings on the part of a judge may give rise to circumstances where disqualification is constitutionally required. *Offut v. United States*, 348 U.S. 11 (1954) (trial judge who had become personally embroiled with counsel could not preside over contempt proceeding); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (trial judge had been personally attacked by defendant throughout the trial could not preside over contempt proceeding). Prior participation in the prosecution of a case and extra-judicial exposure to the evidence or other aspects of the proceedings also have been found by this Court, in some circumstances, to require recusal. *In Re Murchison*, 349 U.S. 133 (1955)(judge who had served as judge-grand-jury could not preside over criminal trial).

In Indiana, the Supreme Court is the "ultimate fact finder in an attorney disciplinary proceeding." *In re Moore*, 453 N.E.2d 971 (Ind. 1983). After Chief Justice Shepard and Justice Dickson held a press conference to publicly condemn the alleged conduct that gave rise to the proceedings against petitioner and called for an investigation into and an "aggressive posture" towards such conduct, the "ultimate fact-finder" in petitioner's case was no longer the neutral tribunal due process demands.

The justices were not merely expressing their views on attorney advertising in a generalized fashion and in response to an inquiry. On the contrary, they convened a press conference for the purpose of making known their negative views concerning targeted solicitation of the Evansville crash victims. In so doing, the justices assumed a clear stance on the issue: solicitation of the victims was improper and should be investigated. Indeed, the court's opinion imposing discipline on petitioner unequivocally states, "Chief Justice Randall Shepard and Justice Brent Dickson held a press conference during which they called for an investigation into the advertising and solicitation practices which *they perceived as improper.*" App. 7a. (emphasis added). In other words, the justices had pre-judged the matter and, by their own admission, before hearing the case on the merits, had determined that the conduct at issue was improper.

By calling for an investigation, the justices not only expressed their personal views on a matter they would later be charged with adjudging, they also became a part of the prosecutorial process. It is uncontested that no private citizen of the State of Indiana ever filed a complaint of misconduct against petitioner. It is also uncontested that at the time of the March 9, 1992 press conference the Disciplinary Commission, having not received any complaints of misconduct, had not filed a grievance against petitioner. The grievance that ultimately was filed was in response to the call for an investigation by the Indiana Supreme Court justices, who thereby

became the true complainants against petitioner. Having been a part of that process the justices could not be, "in the very nature of things, wholly disinterested in the [outcome]." *In Re Murchison*, 349 U.S. at 137. Chief Justice Shepard and Justice Dickson had crossed the line separating neutrality from partisanship.

The pre-complaint conduct of Chief Justice Shepard and Justice Dickson also revealed that they were in possession of knowledge acquired outside of the proceedings. At the time of the press conference there was no ongoing proceeding or investigation into the solicitation practices denounced by the justices. In calling for an investigation, the justices necessarily were considering information they received outside of the proceedings. Accordingly, Chief Justice Shepard and Justice Dickson were acting on personal knowledge, gained from an unknown source, the credibility of which was untested by the adversarial process.

As this Court has recognized, such personal knowledge on the part of a judge jeopardizes the fairness of the proceedings. When a judge presides over a controversy bringing with him personal knowledge of the disputed facts, due process is compromised by the likelihood that the judge will rely "on his own personal knowledge and impression of what [occurred], an impression that 'could not be tested by adequate cross-examination.'" *Withrow v. Larkin*, 421 U.S. 35, 53 (1975) (quoting *In Re Murchison*, 349 U.S. 1t 138). By itself, the extra-judicial acquisition of information might not rise to the level of a constitutional infirmity in the process; however, in the context of this case, where the supreme court justices had publicly taken a stance on the matters at issue in the proceeding and had directed the initiation of the action against petitioner, it is but one more clear indication that the tribunal charged with adjudging petitioner's rights was not free from prejudgment and bias.

The manner in which the Indiana Supreme Court presided over this matter leaves no room for doubt that judicial bias was not only likely under the circumstances but, in fact, characterized the proceedings. The court ruled against petitioner on every motion he filed, even those that were consented to or uncontested. For example, petitioner filed a *consent* motion to stay the proceedings that was granted by the hearing officer: subsequently, the supreme court *sua sponte* denied the motion. In ruling against petitioner, the court never once cited to legal authority but rather, denied, in summary fashion, any type of relief sought by petitioner.[6] It is within the realm of possibility that all of these rulings were made in good faith and on the merits; however, the court's order of February 18, 2002 rebuts any presumption of even-handedness that may have existed up to that point.

The February 18, 2002 order of the Indiana Supreme Court, authored by the Chief Justice, was an effort to assist respondent with the prosecution of its case. Having reviewed petitioner's request for review of the hearing officer's findings, the court apparently became concerned that petitioner might just prevail on his argument that the evidence failed to prove that any citizen of Indiana received petitioner's brochure. In an effort to avoid this result, the Chief Justice, in the longest order issued during the nine-year history of the case, *ordered* the respondent to file a grossly late response to the petition for review, told respondent the arguments to make, and, finally, in a complete abdication of its duty to preside neutrally, as a reviewing court, the court directed the parties "to show cause why the record in this case should or

---

[6] Petitioner filed motions and briefs of considerable length and detail, providing legal citations for every proposition. Petitioner's motions, were ruled on in one paragraph, two at the most, with none of the legal arguments addressed in any meaningful fashion. *See* App. 19a-20a.

should not be reopened for the presentation of evidence as to the jurisdictional issue."[7] App. 22a-23a.

The Indiana Supreme Court was charged with reviewing the findings and recommendations of the hearing officer, *de novo*, and issuing a decision. Its role was to serve as an appellate court. Instead, the court sought to involve itself in the proceedings by suggesting arguments to the respondent, waiving its own rules for the benefit of respondent, and implicitly endorsing a wholly unlawful procedure whereby the record would be changed before the court made its decision on review. By suggesting a reopening of the record of this concluded proceeding for the purpose of allowing one party (respondent) to adduce evidence crucial to its case, the Indiana court revealed its "deep-seated . . . antagonism or favoritism that [made] fair judgment impossible." *Lidetky v. United States*, 510 U.S. 540, 555 (1994).[8]

Even if the Indiana Supreme Court could have judged this matter without bias, it could not have done so without the appearance of bias, as due process requires. As this Court has recognized, and often reiterated

> [J]ustice must satisfy the appearance of justice . . . and this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the

---

[7] Ultimately, the court elected not to press forward with the reopening of the concluded case. Respondent offered no real argument and no legal authority in support of the proposition that the case should be reopened while petitioner filed a strenuous objection to the "show cause order." Subsequently, the court simply ignored the issue, as though it had never raised it in the first place.

[8] Petitioner does not suggest that the court's rulings standing alone prove bias of the type that would require recusal as a constitutional matter. Petitioner asserts that the conduct of Chief Justice Shepard and Justice Dickson, indicated that they had prejudged the controversy; the rulings of the court stand as the direct result, and evidence of, that prejudgment.

> contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice.'

Murchison, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). The very public conduct of the Chief Justice Shepard and Justice Dickson in connection with these proceedings manifested a bias against petitioner and tainted the proceedings with, at a minimum, the appearance of partiality, which rendered the proceedings constitutionally infirm.

"The requirement of neutrality has been jealously guarded by this Court." *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980). Recognizing the paramount importance of a disinterested tribunal, the Court has frequently granted review to safeguard the due process requirement of judicial impartiality. In this case there was neither the appearance nor the reality of impartiality. While "most questions concerning a judge's qualifications to hear a case are not constitutional ones," questions of actual bias are. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). The constitutional "floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' . . . before a judge with no actual bias against the defendant. . ." *Id.* (*quoting Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). In view of the naked bias that characterized these proceedings, review plainly is appropriate and necessary.

III. THE DECISION OF THE INDIANA SUPREME COURT IS CLEARLY ERRONEOUS

In these proceedings respondent was charged with proving by clear and convincing evidence that petitioner violated the Indiana Rules of Professional Conduct. The clear and convincing standard is a stringent one and cannot be met through speculation, inference or guesswork. The sole source of record evidence in this case, as agreed by the parties, was the complaint and the answer. This evidence did not establish

any misconduct by petitioner; in fact it failed to prove even the most basic elements of the charged offenses. In finding petitioner guilty on this woefully anemic record, the Indiana Supreme Court not only abdicated its responsibility to conduct a dispassionate *de novo* review of the record but also deprived petitioner of a meaningful opportunity to be heard by refusing to consider his dispositive evidentiary arguments.

A. There Was No Evidence Petitioner Violated the Indiana Rules of Professional Conduct Because There Was No Evidence Any Indiana Resident Received Petitioner's Brochure

It is not disputed that the record contained no evidence about the residence of the five recipients of petitioner's brochure. The complaint did not identify them as citizens of Indiana but merely stated their names. The answer admitted that brochures were sent to the named people. Accordingly, the record evidence was devoid of any allegation or proof that petitioner's brochure was sent to or received in the State of Indiana. Obviously, this omission was, or should have been, fatal to respondent's case; however, the Indiana Supreme Court committed a plain, indeed glaring and deliberate error through which this result was avoided.

At the outset, the court admitted "the verified complaint, while listing the names of the persons to whom the respondents directed communications, *does not specifically allege that they were residents of Indiana.*" App. 5a. (emphasis added). The court then proceeded to provide its reasons as to why this utter failure of the evidence doesn't matter. First and foremost among the court's erroneous reasons, was the finding that "at the fact-finding stage of these proceed ings . . . Coale never argued that the targets of the solicitations were not specifically proven to be Indiana residents." App. 5a. Accordingly, it was held, petitioner had "waived the argument upon review." App. 5a-6a. This finding is simply wrong. In petitioner's Brief In Opposition to the Charges,

which was submitted to the hearing officer, petitioner argued that the evidence failed to prove his firm's brochure was sent to or received by any resident of Indiana. App. 46a, 62a. Petitioner's submission to the hearing officer was the appropriate time and vehicle for making this argument, *i.e.* after the close of the evidence, in argument to the judge. The only way the court could conclude that petitioner failed to raise the issue during the fact-finding was by ignoring petitioner's submission to the hearing officer as though it did not exist, which is exactly what the court did.

There can be no doubt that, during the adjudicative phase of the proceedings, the hearing officer received and considered petitioner's brief submitted in opposition to the charges. The hearing officer's decision plainly states, "Comes now the Hearing Officer in this matter and having received the Indiana Supreme Court Disciplinary Commission's . . . submission of a brief in resuscitation (sic) of admissions and *having received the Respondents*[9] *brief* . . . does now find, conclude and rule as follows . . ." App.14a (emphasis added).[10] Despite the plain language of the hearing officer's ruling, the court found that, without a file stamp, there was no indication that "the document [*i.e.* petitioner's brief] was ever filed before the hearing officer." App. 5a. With this fiction, the court effectively wiped out, and relieved itself from having to consider, petitioner's dispositive evidentiary argument and ensured petitioner would not prevail, no matter how strong his position or how weak the evidence.

As the Indiana Supreme Court well knew, the hearing officer was a civilian attorney, not a judge associated with a court from which "file-stamped" copies could be obtained. Neither petitioner nor respondent filed their submissions to

---

[9] Petitioner was the respondent below.

[10] The hearing officer also discusses a footnote in petitioner's brief, a further indication that he both received and reviewed it.

the hearing officer with the Indiana Supreme Court, nor were they required to do so. The refusal to accept the validity of petitioner's brief was an artifice through which the court could ignore petitioner's argument.

Perhaps recognizing the weakness of its position, the court asserted additional "reasons" why it was entitled to ignore petitioner's properly preserved evidentiary argument about the failure to prove that Indiana residents received his brochure. First, the court suggested petitioner had an obligation to raise this issue in his answer (filed in 1993). In support of this notion the court cites to Admission and Discipline Rule 23 (14)(b), which provides, "an answer shall admit or controvert the averments set forth in the complaint . . . averments in the complaint are admitted when not denied in the answer." App. 5a, n.5. The problem with the court's suggestion is two-fold: it relies on the 2002 version of Rule 23, rather than the 1993 version, which *did not contain the language quoted by the court,*[11] and, more importantly, it fails to elaborate how or why petitioner should admit or deny an averment everyone agrees does not appear in the complaint.

Contrary to the position of the Indiana Supreme Court, petitioner had no obligation to raise deficiencies in the evidence until the close of the evidence. The burden of proving each and every element of the offenses charged was at all times on respondent; it was not the responsibility to petitioner to advise respondent that, by resting on the pleadings, it would not meet its burden of proof. Petitioner had the right to put respondent to its proof and then to challenge the sufficiency of it through argument: that is the adversarial process.

Beyond its improper rejection of petitioner's evidentiary argument, the court offered no basis for finding the "evidence" sufficient to prove Indiana residents received petition-

---

[11] Obviously, petitioner's answer was governed by the rule then in effect, the text of which appears at App. 28a-39a.

er's brochure. The court simply concluded, "Upon review of the evidence in the case, the hearing officer concluded that the targets of the solicitations were Indiana residents. Accordingly, we find that the record in this case is sufficient to support the inference that the targets of the respondents' solicitations were Indiana residents." App. 5a. Yet, the hearing officer's decision is devoid of any indication that he actually considered this issue and found it as a matter of fact; moreover, the Indiana Supreme Court was charged with conducting a *de novo* review of the evidence, not blindly accepting conclusory statements by the hearing officer that have no support in the record.

The Indiana Supreme Court's finding that the people who received petitioner's brochure were from Indiana is not only clearly erroneous, it is arbitrary and capricious. The record is not in equipoise or fairly debatable on this point; it is silent and can offer no support for the court's conclusion. A fact-finder is not free to disregard uncontroverted evidence. *See Chesapeake & O.Ry.O v. Martin*, 283 U.S. 209, 216 (1931).

In the absence of any evidence that petitioner contacted any person in the State of Indiana, there can be no evidence that Indiana's Disciplinary Rules were violated. In order to prove a violation of any of the Disciplinary Rules, there must be some evidentiary basis upon which to base their applicability. With no record evidence that petitioner contacted any citizen of Indiana or did anything in the State of Indiana, there is no basis upon which to find that Indiana's Disciplinary Rules were applicable in the first instance.

B. The Evidence Failed to Prove Petitioner Performed Any Act that Gave Rise to the Allegations of the Complaint

Even if the evidence established that residents of Indiana received the brochure about petitioner's firm, which it plainly did not, there was no record evidence from which the court

could have concluded that it was petitioner who sent or authorized the sending of "the offending materials." App. 6a. The only evidence in this record is the joint answer of petitioner and Philip Allen. In that answer it is admitted that a brochure about petitioner's law firm was sent to five people, the brochure contained the statements quoted in the complaint, and the brochure did not bear the words "Advertising Materials." None of this evidence was sufficient to establish any wrongdoing by petitioner.

Disciplinary proceedings are, by their very nature, individual proceedings against individual attorneys. Theories of vicarious liability may be not be used to establish misconduct. There must be clear and convincing evidence that the individual attorney committed the charged act, or acts, of misconduct. The evidentiary record in this proceeding contains no evidence that petitioner did anything. The evidentiary record does not reflect from whom the materials were allegedly sent—whether Coale, Allen or some third party—and, therefore, fails to establish who, if anyone, is guilty of the misconduct charged. This evidentiary flaw should have been fatal to all of the Commission's allegations; however, the court held that petitioner could be found guilty of misconduct on this record because he was responsible for another lawyer's acts if he "ratified the conduct involved" or if he knew of it and failed to take remedial action. The proposition stated by the court is true, but it has no application here because there was no *evidence* petitioner ratified or knew of any conduct giving rise to the charges.

The court's holding assumes, without evidence, that petitioner played some part in sending this brochure. The court may not substitute its unproven assumptions for clear and convincing evidence and it erred in doing so.

C. The Evidence Failed to Establish That Petitioner's Brochure Required a Designation as "Advertising Materials"

Petitioner was found guilty of violating Rule 7.3(c), which requires attorney advertising materials to be filed with the Disciplinary Commission prior to or at the time of dissemination and to bear the words "advertising material." App. 26a. This finding was clearly erroneous because respondent failed to prove that Rule 7.3(c) applied to petitioner's brochure in the first instance. Pursuant to Rule 7.3(c), an "advertising materials" designation is *only* required on materials sent to a person "with whom the lawyer has no prior personal or professional relationship." App. 26a. There was no allegation or proof that petitioner or his firm had no prior personal or professional relationship with the recipients of the brochure. Without establishing the applicability of Rule 7.3(c) in the first instance respondent could not establish a violation of Rule 7.3(c).

In finding that petitioner violated Rule 7.3(c), the court did not consider whether respondent proved an "advertising materials" designation was required. Had the court addressed this evidentiary failing, as was its obligation, it could not have found a violation of Rule 7.3 (c). The holding of the court that petitioner violated Rule 7.3(c) was clear error.

D. The Court Violated Petitioner's Right to Due Process by Intentionally Ignoring His Arguments on the Evidence

There was a complete failure of the evidence in this case and, in the end, none of the charges of misconduct was proven by any measure, much less by clear and convincing evidence. But the court's decision was not mere error: it was the end result of the intentional refusal to consider petitioner's arguments and the record evidence. By refusing to consider petitioner's properly preserved arguments, the

Indiana Supreme Court denied petitioner "the fundamental right of due process [which] is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(*quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The right to be heard would be meaningless if it did not include the right to make arguments upon the evidence and have those arguments ruled upon. When the arguments of a defendant are not considered or ruled upon at all it is irrelevant for due process purposes that he was allowed to present them on paper. "An opportunity to be heard includes . . . the right to make arguments and receive judicial findings based upon the evidence and the arguments." *Miller v. Industrial Hardwoods Corp.*, 775 N.E.2d 1168, 1171 (Ind. App. 2002). Petitioner was not afforded that right.

CONCLUSION

The petition for certiorari should be granted. When the highest court of a state violates every fundamental due process right of a litigant this Court should act to preserve the integrity of the American legal system.

Respectfully Submitted,

DIANE E. COOLEY *
818 Connecticut Avenue, N.W.
Suite 857
Washington, D.C. 20006
(202) 887-4770

* Counsel of Record

APPENDIX A

SUPREME COURT OF INDIANA

No. 98S00-9303-DI-309

In the Matter of JOHN P. COALE and PHILLIP B. ALLEN.

July 29, 2002

DISCIPLINARY ACTION

PER CURIAM.

Because the respondents, both of whom are attorneys licensed in states other than Indiana, solicited potential clients in this state without complying with our rules governing client solicitation, we find today that they should be barred from engaging in acts constituting the practice of law in this state until further order of this Court.

This matter was instituted with the Disciplinary Commission's *Verified Complaint for Disciplinary Action,* which contained two counts. The first count alleged that the respondents' written solicitations of potential clients violated the *Rules of Professional Conduct for Attorneys at Law.* The second count, in the alternative, alleged that the respondents engaged in the unauthorized practice of law in this state. Pursuant to *Ind.Admission and Discipline Rule 23(11),* this Court appointed a hearing officer who, after hearing, submitted to this Court his findings of fact and conclusions of law. At hearing, the evidence submitted consisted solely of the Commission's verified complaints for disciplinary action, the respondents' answers thereto, and supporting briefs.

Respondent Allen did not appear at hearing.[1] Respondent Coale appeared at hearing and, pursuant to Admis.Disc.R. 23(15), has petitioned this Court for review of those findings. Pursuant to this Court's directive, the Commission has filed a response brief to the respondent's petition for review. Where a respondent petitions this Court for review of the hearing officer's report, our review is *de novo* in nature and entails a review of the entire record presented. *Matter of Barratt,* 663 N.E.2d 536 (Ind.1996).

Respondent Coale is an attorney licensed in the District of Columbia. Respondent Allen is an attorney licensed in the state of California. Neither is or has ever been admitted to the practice of law in the state of Indiana. Neither has ever sought or obtained admission to the Indiana bar pursuant to a *pro hac vice* appointment, pursuant to Admis.Disc.R. 3(2).[2]

The hearing officer found that this case involves the crash of a Kentucky Air National Guard Cargo Plane into certain

---

[1] We note that on December 6, 1995, the hearing officer ordered that, "Phillip B. Allen is ordered separated from John P. Coale for the purposes of cause number and trial. Allen should be given a new and separate cause and cause number. Disciplinary Commission is directed to ensure this is accomplished." The docket in this case does not reflect that the ordered separation was ever accomplished. On January 2, 2001, this Court's clerk sent by mail notice of pre-trial hearing to each respondent to their address as reflected on this Court's clerk's docket. On January 15, 2001, the hearing officer ordered final hearing to be set for March 23, 2001, with notice sent to both respondents to their addresses as reflected on this Court's clerk's docket, again by mail. That order noted that respondent Allen did not appear at pre-trial conference. The hearing officer's findings of fact, filed on June 22, 2001, also reflected that respondent Allen did not appear at the final hearing on March 23, 2001. The docket also indicates that neither notice sent to Allen was returned as undeliverable.

[2] Pursuant to that rule, an attorney not admitted to practice in this state may nonetheless seek a limited admission upon petition for a particular proceeding.

buildings and public areas in Evansville, Indiana on February 6, 1992. In addition to the air crew members who died, at least 11 people were killed and several other people injured as a result of the crash. By their own admission, the respondents sent videotapes, personal letters and folders containing information about their law firm and a firm brochure to seven people who were widows, widowers or surviving parents of the crash victims or to the crash victims themselves. The hearing officer found that these letters, tapes and folders were sent for the express purpose of attempting to obtain the people receiving the information as clients and were soliciting their business. The material did not include the words "advertising material," and the respondents did not send the material to the Disciplinary Commission prior to the time they sent it to the prospective clients. The material did contain the following text, apparently in reference to other disasters:

> "John Coale and Phil Allen came to the aid of thirteen (13) of the victims or their family winning compensation among the highest awards for the case."
>
> "John Coale and Phil Allen represented the families of nine (9) of the victims, helping them through this tragedy and winning for them substantial compensation for their tragic loss."
>
> ". . . the settlement sum is reported to be the largest product liability settlement in U.S. history . . ."
>
> "Phil Allen worked with Plaintiff's steering committee, filing motions and briefs getting the case ready for trial. The result was a hundred and eighty million dollar settlement ($180,000,000), the largest for a personal injury class action suit at the time."
>
> "John Coale represented families of those killed in the blaze as well as several of those injured. His work help

> [sic] lead to over two hundred and twenty five million dollars ($225,000,000) in compensation for Plaintiffs in this case."

At the outset, we note that Respondent Coale argued both at hearing and again in his petition for review of the hearing officer's report that this Court does not have jurisdiction over him in this case because he is not a licensed Indiana attorney. We note that this issue was resolved against other out-of-state respondents in a companion state disciplinary case and related federal cases. *In the Matter of George W. Murgatroyd, III, and Gerald C. Sterns,* 741 N.E.2d 719 (Ind.2001); *Sterns v. Lundberg,* 922 F.Supp. 164 (S.D.Ind.1996) (complaint alleging lack of personal and subject matter jurisdiction dismissed). Our analysis of this jurisdictional issue in *Murgatroyd* we think is applicable to this case as well:

> Notwithstanding the fact that the respondents hold no Indiana law licenses and therefore are not subject to this Court's usual disciplinary sanctions for licensed Indiana attorneys who engage in professional misconduct, any acts which the respondents take in Indiana that constitute the practice of law are subject to our exclusive jurisdiction to regulate professional legal activity in this state. [Footnote omitted] By directing the solicitations to the prospective clients, the respondents communicated to those persons that they were available to act in a representative capacity for them in Indiana courts to address loss or injury associated with the plane crash. As such, they held themselves out to the public as lawyers in this state when neither was admitted to practice here. [Footnote omitted] Those acts constituted professional legal activity in this state subject to our regulatory authority. [Citation omitted]

Murgatroyd at 721.

Upon his petition for review, filed after the hearing officer's findings of fact were filed with this Court, Respondent Coale argues that the Commission presented no evidence that the respondents sent any communication to any Indiana citizen. That fact, he argues, precludes this Court from finding a violation of Indiana's *Rules of Professional Conduct.* It is true that the verified complaint, while listing the names of the persons to whom the respondents directed the communications, does not specifically allege that they were residents of Indiana. At the fact-finding stage of these proceedings, however, Respondent Coale never argued that the targets of the solicitations were not specifically proven to be Indiana residents.[3] In his initial answer to the charges, filed on April 9, 1993, Respondent Coale never argued the recipients' residence.[4] This case proceeded for some 9 years before the issue of the recipients' physical location was ever addressed. Upon review of the evidence in this case, the hearing officer concluded that the targets of the solicitations were Indiana residents. Accordingly, we find that the record in this case is sufficient to support the inference that the targets of the respondents' solicitations were Indiana residents.[5] Further, to allow Respondent Coale, after the

---

[3] In his petition for review, Respondent Coale states that he did argue this point before the hearing officer in his *Brief in Opposition to the Charges of the Disciplinary Commission,* signed by the respondent's counsel on April 6, 2001. However, the copy provided to this Court as an exhibit to the respondent's pleadings upon petition for review of the hearing officer's findings bears no file stamp, and the chronological case summary in this case does not indicate that that document was ever filed before the hearing officer.

[4] *Admission and Discipline Rule 23(14)(b)* provides that an answer "shall admit or controvert the averments set forth in the complaint . . . [a]verments in the complaint are admitted when not denied in the answer."

[5] We also note that one of the recipients in this case, Tom Welch, was also a recipient of solicitations from other out-of-state attorneys after the disaster. Lawyers Gerald C. Sterns and George W. Murgatroyd, III,

close of the fact-finding stage of these proceedings, to now argue as a matter of fact that the targets were not demonstrated to be Indiana residents would be to permit introduction of facts with no opportunity for the Commission to supplement the record with evidence of the recipients' residence. By failing to advance the residence issue until after the fact-finding stage of these proceedings concluded, Respondent Coale waived the argument upon review.

Respondent Coale further argues that there is nothing in the record to indicate that he was involved in any way in sending the offending materials. The respondents' answer, agreed by the Respondent Coale to be evidence in this case, states that the informational materials concerning his law firm, Coale, Allen & Van Susteren, were sent to the persons listed in the verified compliant. He argues that "the partner of a small law firm [like Coale, Allen & Van Susteren] may not be disciplined for the conduct of an (unidentified) individual affiliated with the firm." Even assuming, *arguendo,* that Coale was not directly responsible for the dissemination of the solicitations, the respondent is responsible for another lawyer's acts if the respondent ratified the conduct involved or timely knew of conduct taken by a lawyer over whom he had direct supervisory authority and failed to take reasonable remedial action. Prof.Cond.R. 5.1(c). *Accord,* Prof.Cond.R. 5.3, regarding a lawyer's responsibilities regarding nonlawyers employed by the lawyer.

Respondent Coale also asserts that these proceedings violate the respondents' right to due process because "the court that ultimately will decide this matter is the entity that demanded the pursuit of the disciplinary charges against the respondent[s]." He refers to the fact that on March 9, 1992, Chief Justice Randall Shepard and Justice Brent Dickson held

---

admitted to misconduct by sending the solicitations to Welch and others. *Matter of Murgatroyd and Sterns,* 741 N.E.2d 719 (Ind.2001).

a press conference during which they called for an investigation into the advertising and solicitation practices which they perceived as improper. Because of that press conference, Respondent Coale argues that this Court is not an impartial tribunal with regard to this matter, and thus, pursuant to Canon 3 of the *Code of Judicial Conduct,* must recuse itself from this matter.[6] We note that we have already disposed of this argument once in this case. *Order Denying Motion to Dismiss*, issued June 25, 1993 (stating that the respondents' assertion of alleged judicial conduct does not constitute grounds for disqualification). In any event, this Court did not direct the filing of a formal grievance against the respondents here, but merely called for an investigation into solicitation practices following the airplane crash. The Commission, as a distinct entity, is empowered to bring a disciplinary action on its own grievance, and chose to do so in this case. *See* Admis.Disc.R. 23(10)(a). A hearing officer appointed by this Court has found misconduct following hearing. Due process, as applied to disciplinary proceedings involving attorneys, requires notice of the charges and an opportunity to be heard. *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117, *reh. den.* 391 U.S. 961, 88 S.Ct. 1833, 20 L.Ed.2d 874; *Matter of Stivers*, 260 Ind. 120, 292 N.E.2d 804 (1973); *Matter of Wireman*, 270 Ind. 344, 367 N.E.2d 1368 (1977). The respondents have been afforded both. We find the respondents' argument unpersuasive.

Turning now to the substantive allegations of misconduct, Count I of the complaint alleged that the form and content of

---

[6] *Canon 3(E)* provides, in relevant part:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding [. . .]

the respondents' solicitations were defective under Indiana rules governing such communications. As a general proposition of law, the practice of targeted mail solicitation of prospective clients by lawyers is permitted. *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988), *Murgatroyd, supra.* However, the Commission alleged that the solicitations did not comply with Indiana law governing the content of lawyer advertising. Specifically, the Commission alleged that the solicitation letters were not labeled "advertising material," as required by Prof.Cond.R. 7.3(c).[7] It charged that they contained statistical data or other information based on past performance or a prediction of future success, testimonials about or endorsements of lawyer, and a public communication which appeals primarily to a lay person's fear, greed, desire for revenge, or similar emotion, which statements are prohibited by

---

[7] *Professional Conduct Rule 7.3(c)* provides:

Every written or recorded communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" conspicuously placed both on the face of any outside envelope and at the beginning of any written communication, and both at the beginning and ending of any recorded communication. A copy of each such communication shall be filed with the Indiana Supreme Court Disciplinary Commission at or prior to its dissemination to the prospective client. In the event a written or recorded communication is distributed to multiple prospective clients, a single copy of the mailing less information specific to the intended recipients, such as name, address and date of mailing, may be filed with the Commission. Each time any such communication is changed or altered, a copy of the new or modified communication shall be filed with the Disciplinary Commission at or prior to the time of its mailing or distribution. The lawyer shall retain a list containing the names and addresses of all persons or entities to whom each communication has been mailed or distributed for a period of not less than one (1) year following the last date of mailing or distribution. Communications filed pursuant to this subdivision shall be open to public inspection.

Prof.Cond.R. 7.1(d)(2), (3), and (5).[8] It charged that the respondents did not file the materials with the Commission at or prior to disseminating them, as required by Prof.Cond.R. 7.3(c).[9] It further charged that the statements contained false, fraudulent, misleading, deceptive, self-laudatory or unfair statements or claims, in violation of Prof.Cond.R. 7.1(b).[10] The Commission also charged that the respondents violated the *Rules of Professional Conduct* in violation of Prof. Cond.R. 8.4(a) and that their conduct was prejudicial to the administration of justice in violation of Prof.Cond.R. 8.4(d).[11] The hearing officer found that the respondents violated Prof.Cond.R. 7.1(b), 7.1(d)(3), 7.3(c), and 8.4(d).

---

[8] *Professional Conduct Rule 7.1(d)(2), (3) and (5)* provide:

A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication which:

. . .

(2) contains statistical data or other information based on past performance or prediction of future success; (3) contains a testimonial about or endorsement of a lawyer;

. . .

(5) appeals primarily to a lay person's fear, greed, desire for revenge, or similar emotion[.]

[9] *See* footnote 4, *supra*.

[10] Prof.Cond.R. 7.1(b) provides:

(b) A lawyer shall not, on behalf of himself, his partner or associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

[11] Prof.Cond.R. 8.4 provides, in relevant part:

It is professional misconduct for a lawyer to (a) violate or attempt to violate the rules of professional conduct; . . . (d) engage in conduct that is prejudicial to the administration of justice.

We agree that the respondents violated the rules, as found by the hearing officer. Specifically, the respondent's letters and accompanying materials were self-laudatory and clearly in the nature of endorsements in that they, for example, announced that the respondents helped other victims "through [their] tragedy and winning for them substantial compensation for their tragic loss" and that they won compensation for other victims that was "among the highest awards . . ." They also announced in the materials that Respondent Coale's work in one case "helped to lead to over $225,000,000 in compensation for the Plaintiffs . . ." Respondent Coale contends that the statements were not self-laudatory, but merely factual and objective. We disagree in that the respondents' message was not merely factual but instead contained subjective, favorable judgments as to the nature of the respondents' work and of the merits of the respondents' work in those cases.

Finally, we agree with the hearing officer's conclusion that the respondents' conduct was prejudicial to the administration of justice. The respondents' nonconforming solicitations divested the victims and their families the opportunity to make choices regarding legal counsel on objective grounds with the benefit of fair, acceptable information about the legal services they offered.

Having found misconduct, we must now determine an appropriate discipline for it. As we stated in *Murgatroyd*, since the respondents are not licensed in Indiana, our choices of sanction do not include direct impingement of their law licenses. *Murgatroyd*, 741 N.E.2d at 721. We can, however, regulate the professional conduct of lawyers which occurs within the borders of this state. *Id.* The respondents' gross violation of this state's rules governing solicitation warrants their exclusion of practice from this state for a period of time in order to ensure that, should they ever again solicit clients in this state, they will abide by Indiana's *Rules of Professional*

Conduct. See, e.g., Matter of Fletcher, 694 N.E.2d 1143 (Ind.1998) (two year exclusion from *pro hac vice* admission for violation of Indiana *Rules of Professional Conduct* while so admitted).

It is, therefore, ordered that the respondents, John P. Coale and Phillip B. Allen, are hereby barred from acts constituting the practice of law in this state (including *pro hac vice* admission) until further order of this Court. Additionally, they are assessed the costs of this proceeding.

The Clerk of this Court is directed to provide notice of this order in accordance with Admis.Disc.R. 23(3)(d) and to the hearing officer, and to provide the clerk of the United States Court of Appeals for the Seventh Circuit, the clerk of each of the United States District Courts in this state, and the clerks of the United States Bankruptcy Courts in this state with the last known address of respondent as reflected in the records of the Clerk.

APPENDIX B

IN THE SUPREME COURT
IN THE STATE OF INDIANA

Case No. 98S00-9303-DI-309

In The Matter of JOHN P. COALE,

and

PHILLIP B. ALLEN.

HEARING OFFICER'S SUBMISSION OF
FINDINGS, CONCLUSIONS AND RULING

Comes now the Hearing Officer in this matter and having received the Indiana Supreme Court Disciplinary Commission's (hereinafter the "Commission") submission of a brief in resuscitation (sic) of admissions and having received the Respondents' brief and having received the Commission's reply, does now find, conclude and rule as follows:

1. The Hearing Officer denies the Respondents' Motion to Dismiss the Complaint filed against the Respondents as being both already addressed by the Supreme Court of Indiana and outside the scope of issues assigned to this Hearing Officer. This finding and conclusion is based upon previous proceedings herein and the footnote addressing this very issue found at the bottom of page 1 of the Respondents' Brief in Opposition to charges of the Disciplinary Commission.

2. The Hearing Officer denies the Respondents' request to dismiss this matter because of lack of jurisdiction for the following reasons:

   a. The question is whether the Respondents' contacts are sufficient to support personal jurisdiction being exercised over them so as to provide them due process. The constitutionality of this process is to determine whether "the Defendants' conduct in connection with the forum state are such that he should reasonably anticipate being haled into court there." *World Wide Volkswagen Corp. v. Woodson* 444 U.S. 286, 297.

   b. As long as there is a close nexus between the matter in controversy and the nature of the contacts between the non-resident Defendant and the form (sic) state, very minimal contacts are needed to satisfy due process.

   c. There is a direct connection between the matter in controversy of the Respondents' solicitations and the nature of the Respondents' contacts with the (sic) Indiana which are the mailings.

   d. "Where a forum seeks to assert specific jurisdiction over an out of state Defendant who has not consented to suit there, the fair warning requirement is satisfied if the Defendant has purposely directed his activities at his residence of the forum." *Keaton v. Hustler Magazine, Inc.* 465 U.S. 770, 774 (1984).

3. Herein the Respondent directed solicitation directly to residents of the State of Indiana. Because of this, Indiana Supreme Court Disciplinary Commission has jurisdiction and the right to level charges and have this matter heard by a hearing officer.

BEST AVAILABLE COPY

4. The Hearing Officer finds nothing that violates the due process of the Respondents in this matter. To the contrary, the procedures and hearings in this matter have offered, at every stage, due process, notice and the right to be heard to the Respondents.

5. This case involves the crash of a Kentucky Air National Guard Cargo Plane into certain buildings and public areas in Evansville, Indiana on February 6, 1992. In addition to the air crew members who died, at least eleven (11) people were killed and several other people were injured as a result of the crash.

6. The Respondents by their own admission sent video-tapes, personal letters and folders containing information about the firm and a firm brochure to the following individuals:

   a. Tom and/or his wife, Judy Welsh

   b. Susan Prasek, widow of Matthew Prasek

   c. April Keown, widow of Ronnie E. Keown

   d. Mr. and Mrs. John Berqwist, surviving parents of Charles R. Berqwist

   e. Stacy Scott, widower of Lynnette Scott.

7. The Court finds that these letters, tapes and folder were sent for the express purpose of attempting to obtain the people receiving the information as clients and were soliciting their business. Solicitation may be a conclusion but no other logical conclusion can be drawn from one sending information of this nature to these specific individuals at that time.

8. The Respondents have admitted they violated Rule 7.3(c) of the Rules of Professional Conduct for Attorneys at Law in that none of the materials sent to

the individuals above listed included the words "advertising materials" as required by the rule.

9. The advertising material sent to the people included self laudatory statements such as "John Coale and Phil Allen came to the aide of thirteen (13) of the victims or their family winning compensation among the highest awards for the case"; "John Coale and Phil Allen represented the families of nine (9) of the victims, helping them through this tragedy and winning for them substantial compensation for their tragic loss"; "the settlement sum is reported to be the largest product liability settlement in U.S. history."; "Phil Allen worked with Plaintiff's steering committee, filing motions and briefs and getting the case ready for trial. The result was a hundred and eighty million dollar settlement ($180,000,000.00), the largest for a personal injury class action suit at the time"; and "John Coale represented families of those killed in the blaze as well as several of those injured. His work help lead to over two hundred and twenty-five million dollars ($225,000,000.00) in compensation for Plaintiffs in this case." These statements are self praising. Furthermore, the Respondents have admitted that they did in fact send items that contained these comments. Thus, they violated Rule 7.1(b) of the Rules of Professional Conduct for Attorneys at Law.

10. The plain reading of the material and the Respondents' admission to paragraph 12 of the Request for Admission (sic) show that the items contained endorsements or testimonials. These endorsements violate Rule 7.1(d)(3) of the Rules of Profession (sic) Conduct for Attorneys at Law.

11. The Respondents failed to submit or file their advertising materials with the Indiana Supreme Court

Disciplinary Commission at or prior to the information being disseminated as required by Rule 7.3(c). Obviously, this conduct by the Respondents' admission to this, notwithstanding their claim of inadvertent error, violated Rule 7.3(c) of the Rules of Professional Conduct for Attorneys at Law.

12. The fact that the Respondents, by claiming inadvertent error, did not read the Rules of Professional Conduct for Attorneys at Law is not a defense to that violation.

13. Efforts at advertising and soliciting clients in direct violation of the Rules of Professional Conduct of Attorneys at Law is conduct prejudicial to the administration of justice. By conducting themselves in this fashion, the Respondents violated rule 8.4(d) of the Rules of Professional Conduct for Attorneys at Law.

WHEREFORE, the Hearing Officer finds the Respondents have violated the Rules of Professional Conduct for Attorneys at Law for the State of Indiana as outlined and listed herein above.

FURTHER, the Hearing Officer finds that the Respondents committed such misconduct and should be appropriately sanctioned by the Supreme Court of Indiana.

THEREFORE, the Hearing Officer recommends that the Respondents receive a public reprimand and be enjoined from advertising, soliciting or practicing law in the State of Indiana until duly admitted, allowed or having advertising information approved by the Supreme Court of Indiana. Costs assessed against the Respondents.

All Found, Concluded And Recommended This 19th Day of June, 2001.

/s/ Jeffrey Eggers
JEFFREY C. EGGERS
Hearing Officer

cc: Charles M. Kidd, Staff Attorney
Indiana Supreme Court Disciplinary Commission
115 W. Washington Street, Suite 1165 South Tower
Indianapolis, IN 46204

Diane E. Cooley, Esq.
COALE, COOLEY, LIETZ, McINERNY & BROADUS
818 Connecticut Avenue, N.W., Suite 857
Washington, D.C. 20006

Robert W. Hammerle
HAMMERLE & ALLEN
501 Indiana Avenue, Suite 200
Indianapolis, IN 46202

Honorable Randall T. Shepard
Chief Justice, Supreme Court of Indiana
304 State House
200 W. Washington Street
Indianapolis, IN 46204

APPENDIX C

IN THE
SUPREME COURT OF INDIANA

Case No. 98S00-9303-DI-309

In the Matter of JOHN P. COALE, and PHILLIP B. ALLEN

ORDER ADVISING PARTIES OF
INTENDED PROCEDURE

Upon review of the matters filed in this case, we find that the parties have some question as to the nature of the proceeding to be employed in this action initiated under both Admission and Discipline Rules 23 and 24.

ACCORDINGLY, THE PARTIES ARE HEREBY ADVISED that the Court will consider dispositional jurisdictional issues before commencing with the fact-finding process under Admission and Discipline Rules 23 and 24. In the event the Court concludes that the Respondents are subject to the jurisdiction of this Court, the Court intends to appoint an individual to concurrently serve as Hearing Office under Rule 23 and as Commissioner under Rule 24. The ultimate decision will be rendered by this Court upon review of the findings and recommendations tendered by such Hearing Officer/Commissioner.

The Clerk of this Court is directed to forward a copy of this Order to the Indiana Supreme Court Disciplinary Commission and to the Respondents.

DONE at Indianapolis, Indiana, this 3rd day of June, 1993.

FOR THE COURT

/s/ Randall T. Shepard
RANDALL T. SHEPARD
Chief Justice of Indiana

APPENDIX D

IN THE
SUPREME COURT OF INDIANA

Case No. 98S00-9303-DI-309

In the Matter of JOHN P. COALE, and PHILLIP B. ALLEN.

ORDER DENYING MOTION TO DISMISS

Come now the Respondents in this proceeding, *pro se*, and file their "Respondents' Objection to Intended Procedure and Motion to Dismiss Complaint or Petition" and their Memorandum of Law is support of such pleading. Respondents assert that several members of the Court are disqualified, object to the continuation of this proceeding, and pray that this matter be dismissed with prejudice.

Upon examination of the matters now before this Court, we find that Respondents' assertion of alleged judicial conduct does not constitute grounds for disqualification under Canons 2 and 3 of the *Code of Judicial Conduct*.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by this Court that Respondent's Motion to Dismiss is denied.

The Clerk of this Court is directed to forward a copy of this Order to the Indiana Supreme Court Disciplinary Commission and to the Respondents.

DONE at Indianapolis, Indiana, this 25th day of June, 1993.

/s/ Randall T. Shepard
RANDALL T. SHEPARD
Chief Justice of Indiana

All Justices concur.

APPENDIX E

IN THE
SUPREME COURT OF INDIANA

Case No. 98S00-9303-DI-309

In the Matter of JOHN P. COALE.

ORDER DENYING MOTION TO DISMISS

Comes now the respondent, John P. Coale, by counsel, and moves this Court to dismiss the *Verified Complaint for Disciplinary Action* pending against him. Specifically, the respondent asserts that further prosecuting this case in light of the passage of time during which this matter has pended will now deny him certain due process rights.

And this Court, being duly advised, now finds that there is no statute of limitation for disciplinary cases. We find further that the respondent has failed to demonstrate any specific prejudice to him occasioned by the passage of time. Accordingly, we find that his motion to dismiss should be denied.

IT IS, THEREFORE, ORDERED that the respondent's *Motion to Dismiss All Charges* is hereby denied.

The Clerk of this Court is directed to forward notice of this Order to the hearing officer in this matter, to the respondent or his attorney and to the Indiana Supreme Court Disciplinary Commission.

DONE at Indianapolis, Indiana, this 5th day of December, 2000.

/s/ Randall T. Shepard
RANDALL T. SHEPARD
Chief Justice of Indiana

All Justices concur.

APPENDIX F

IN THE
SUPREME COURT OF INDIANA

Case No. 98S00-9303-DI-309

In the Matter of JOHN P. COALE and PHILLIP B. ALLEN.

OFFICIAL NOTICE

A Pre-Hearing Conference was held by the hearing officer on January 12, 2001, wherein the Disciplinary Commission appeared by Charles Kidd, the Respondent, John Coale appeared by Will Riley and Diane Cooley and the Respondent, Allen, failed to appear. Cause is set for hearing in the Disciplinary Commission's Conference Room on Friday, March 23, 2001, at 9:00 a.m. Parties, as to the Coale matter, intend to file Briefs and proposed Findings and Conclusions on that date with no evidentiary presentation. Should this change, the parties are to notify each other immediately. Final Pre-Trial Conference by telephone (Charles Kidd to arrange) is set for March 16, 2001, at 3:00 p.m.

ALL OF WHICH IS ORDERED THIS 15th DAY OF JANUARY, 2001.

/s/ Jeffrey C. Eggers
JEFFREY C. EGGERS, Hearing Officer

APPENDIX G

IN THE
SUPREME COURT OF INDIANA

Case No. 98S00-9303-DI-309

In the Matter of JOHN P. COALE and PHILLIP B. ALLEN.

ORDER

This Court has before it the hearing officer's findings of fact and conclusions of law and respondent John P. Coale's petition for review of that report. We note that in the respondent's brief in support of its petition for review, filed after hearing, the respondent argues that there is nothing in the record to demonstrate that respondent Coale sent any communication whatsoever to a citizen of the state of Indiana. The Disciplinary Commission did not file a response to the argument. There is nothing in the record of this case which indicates that the issue was ever contested during litigation of this matter.

Accordingly, we now find that the Commission should file a response to the respondent's petition for review.

IT IS, THEREFORE, ORDERED that the Disciplinary Commission is directed to respond to respondent John P. Coale's petition for review. In particular, the Commission is directed to respond to the contention of a lack of jurisdiction based on the alleged lack of Indiana citizenship of the targets of the respondents' solicitations, and whether the record supports the hearing officer's findings of attorney misconduct based on those solicitations. If the record does not support the findings, the parties are directed to show case why the

record in this case should or should not be reopened for the presentation of evidence as to the jurisdictional issue.

The Clerk of this Court is directed to forward notice of this Order, by certified mail, return receipt requested, to the respondents or their attorneys and to the Indiana Supreme Court Disciplinary Commission.

DONE at Indianapolis, Indiana, this 18th day of February, 2002.

/s/ Randall T. Shepard
RANDALL T. SHEPARD
Chief Justice of Indiana

All Justices concur.

APPENDIX H

INDIANA RULES OF PROFESSIONAL CONDUCT
(West 1992)

Rule 7.1. Publicity and Advertising

(a) Subject to the requirements of this Rule, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television or through other public communication.

(b) A lawyer shall not, on behalf of himself, his partner or associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

* * *

(c) Without limitation a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim includes a statement or claim which:

(1) contains a material misrepresentation of fact;

(2) omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;

(3) is intended or is likely to create an unjustified expectation;

(4) states or implies that a lawyer is a certified or recognized specialist other than as permitted by Rule 7.4;

(5) is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;

(6) contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable

warnings or disclaimers necessary to make a representation of implication not deceptive.

(d) A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication which:

(1) is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;

(2) contains statistical data or other information based on past performance or prediction of future success;

(3) contains a testimonial about or endorsement of a lawyer;

(4) contains a statement or opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services;

(5) appeals primarily to a lay person's fear, greed, desire for revenge, or similar emotion; or

(6) is prohibited by Rule 7.3.

(e) A lawyer shall not compensate or give anything of value to a representative of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item. An advertisement must be identified as such unless it is apparent from the context that it is an advertisement. A copy or recording of an advertisement shall be approved by the lawyer and shall be kept for six years after its dissemination along with a record of when and where it was used.

APPENDIX I

Rule 7.3. Recommendation or Solicitation of Professional Employment

(a) A Lawyer shall not seek or recommend by in-person contact (either in the physical presence of, or by telephone), the employment, as a private practitioner, of himself, his partner, associate, or his firm, to a nonlawyer who has not sought his advice regarding employment of a lawyer, or assist another person in so doing.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a) if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" conspicuously placed both on the face of any outside envelope and at the beginning of any written communication, and both at the beginning and ending of any recorded communication. A copy of each such communication shall be filed with the Indiana Supreme Court Disciplinary Commission at or prior to its dissemination to the prospective client.

* * *

APPENDIX J

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

APPENDIX K

INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEY
(West 1993)

Rule 23. Disciplinary Commission and Proceedings

Section 1. General Principles

Each person granted the privilege to practice law in this State has the obligation to conduct himself at all times in a manner consistent with the trust and confidence reposed in him by this Court and in a manner consistent with his duties and responsibilities as an officer or judge of the courts of this State. This Court has exclusive jurisdiction of all cases in which an attorney who is admitted to the bar of this Court or who practices law in this State (hereinafter referred to as "attorney") is charged with misconduct. The procedures hereinafter set forth shall be employed and construed to protect the public, the court and the members of the bar of this State from misconduct on the part of attorneys and to protect attorneys from unwarranted claims of misconduct.

The term "attorney" as used in this rule shall include, in addition to all persons admitted to the bar of this Court, or who practice law in this State, any and all judges of any and all courts of this State now in existence or hereafter created or established.

Section 2. Grounds for Discipline or Suspension

(a) Any conduct that violates the Rules of Professional Conduct or the Code of Judicial Conduct and Ethics heretofore adopted or as hereafter amended by this Court or any standards or rules of legal and judicial ethics or professional responsibility then in effect or hereafter adopted by this Court shall constitute grounds for discipline.

(b) If an attorney admitted to practice in this State who is also admitted to practice in any other state should be disbarred or suspended by the proper authority of such other state, such disbarment or suspension shall constitute sufficient grounds for disbarment or suspension of said attorney in this State.

(c) Any attorney who becomes disabled by reason of physical or mental illness or infirmity or because of the use of or addiction to intoxicants or drugs shall be subject to suspension by reason of such disability.

Section 3. Types of Discipline and Suspension

(a) One of the following types of discipline may be imposed upon any attorney found guilty of misconduct: permanent disbarment from the practice of law subject to reinstatement as hereinafter provided; suspension for a definite or an indefinite period from the practice of law subject to reinstatement as hereinafter provided; suspension for a definite period, not to exceed six (6) months, from the practice of law with provision for automatic reinstatement upon such conditions as the Court shall specify in the order of suspension; a public reprimand; or a private reprimand.

(b) Any attorney found disabled by reason of physical or mental illness or infirmity or by use of or addiction to any intoxicants or drugs shall be suspended for the duration of such disability.

(c) In cases of misconduct or disability, this Court may, in lieu of permanent disbarment or suspension place a lawyer on probation and permit him to continue practicing law if in its opinion such action is appropriate and desirable. In such event, the lawyer will be subject to such conditions, limitations and restrictions as this Court may see fit to impose, and upon a violation of such conditions, restrictions or limitations, said attorney may be suspended or disbarred.

(d) Notice of permanent disbarment, suspension or public reprimand shall be communicated to the parties to the proceeding, the Clerk of this Court, the Clerk of each of the Federal District Courts in this State, the Clerk of the Court and Bar Association of each county in which the attorney maintains an office, the Clerk of the Court and Bar Association of each contiguous county, a newspaper of general circulation in each county in which the attorney maintains an office, the official publication of the Indiana State Bar Association, and the American Bar Association. Notice of private reprimand shall be communicated to the parties to the proceeding and the Clerk of this Court. In cases where probation is imposed by this Court, the Clerk shall notify such persons as the Court may direct of the action taken and of the restriction, conditions or limitations.

* * *

Section 10. Investigatory Procedures.

(a) Upon receipt of a written, verified claim of misconduct (hereinafter referred to as "the grievance"), from a member of the public, a member of this bar, a member of the commission, or a Bar Association and completion of such preliminary investigation as he deems appropriate, the Executive Secretary shall:

(1) Dismiss the claim, with the approval of the commission, if he determines that it raises no substantial question of misconduct; or

(2) If he determines that it does raise a substantial question of misconduct, send a copy of the grievance by certified mail to the attorney against whom the grievance is filed (hereinafter referred to as "the respondent") and shall request a written response within twenty (20) days after the respondent receives a copy of the grievance. In the event of a dismissal as provided herein, the person filing the grievance and the respondent shall be given

written notice of the Executive Secretary's determination. In the event of a determination that a substantial question exists, the matter shall proceed to (b) hereinafter.

(b) Thereafter, after notice to the respondent, if the Executive Secretary, upon consideration of the grievance, the preliminary investigation and any response from the respondent, determines there is a reasonable cause to believe that the respondent is guilty of misconduct the grievance shall be docketed and investigated. If he determines that no such reasonable cause exists, the grievance shall be dismissed with the approval of the commission. In either event, the person filing the grievance (hereinafter referred to as "the complainant") and the respondent shall be given written notice of the Executive Secretary's determination.

(c) If the grievance is docketed, for investigation, the Executive Secretary shall conduct an investigation of the grievance. Upon completion of the investigation the Executive Secretary shall promptly make a report of the investigation and his recommendations to the commission at its next meeting.

(d) In conducting an investigation of any grievance, or in considering the same, the Executive Secretary or the commission shall not be limited to an investigation or consideration of only matters set forth in the grievance, but shall be permitted to inquire into the professional conduct of the attorney generally. In the event that the Executive Secretary or the commission should consider any charges of misconduct against an attorney not contained in the grievance, the Executive Secretary shall notify the attorney of the additional charges under consideration, and the attorney shall have the opportunity to make a written response to the additional charges under consideration within twenty (20) days after the receipt of such notification.

Any additional charges of misconduct against an attorney, after such notice has been given by the Executive Secretary and the attorney has had an opportunity to reply thereto, may be the subject of a count of any complaint filed against the attorney pursuant to Sections 11 and 12 of this rule.

(e) Upon receipt of information indicating that an attorney has been convicted of a crime punishable as a felony under the laws of any state or of the United States, the Executive Secretary shall verify the information, and, in addition to any other proceeding initiated pursuant to this Rule, shall file with the Supreme Court a Notice of Conviction and Request for Suspension, and shall forward notice to the attorney by certified mail.

Section 11. Pre-hearing Procedures.

(a) Upon finding that an attorney has been convicted of a crime punishable as a felony, the Supreme Court may suspend such attorney from the practice of law pending further order of the Court or final determination of any resulting disciplinary proceeding.

(b) When it receives a Request for Suspension, the Court may issue an order suspending the attorney, and such suspension shall be effective thirty (30) days after the issuance of the order. Within twenty (20) days after the issuance of said order, the attorney may assert in writing any deficiency that establishes that the suspension may not properly be ordered.

(c) The judge of any court in this state in which a lawyer is convicted of a crime shall, within ten (10) days after the conviction, transmit a certified copy of the judgment of conviction to the Executive Secretary of the Indiana Supreme Court Disciplinary Commission.

(d) The members of the Commission shall consider and make a determination of the report and recommendations of the Executive Secretary not later than the meeting following

the submission of the report. If the Commission determines that there is not reasonable cause to believe that the respondent is guilty of misconduct the grievance shall be dismissed, and the complainant and the respondent shall be given written notice of the Commission's determination.

(e) If after such consideration, the Commission determines there is a reasonable cause to believe respondent is guilty of misconduct, which would warrant disciplinary action, it shall file with the Clerk a complaint as provided in Section 12 and it shall so report to the Supreme Court, who shall thereupon appoint a hearing officer or officers, not to exceed three (3) in number, who shall be members of the Bar of this Court, none of whom shall be members of the Disciplinary Commission, to hear and determine said charges.

(f) If after such consideration aforesaid, the Commission determines there is reasonable cause to believe respondent is guilty of misconduct which, if proven, would warrant suspension pending prosecution, it shall include a motion to that effect in the aforesaid report to this Court, and this Court shall so advise the hearing officer or officers.

(g) After the filing of a complaint with the Clerk, the parties (commission and respondent) may conditionally agree upon the discipline to be imposed, in which event they shall jointly submit to the Court Administrator a statement of circumstances which shall contain the charges, the facts agreed to, the facts in dispute, the evidence the parties separately believe would be adduced in a hearing, and the discipline with which the parties are in conditional agreement. Said statement may also contain any other information that the parties deem relevant, other than statements by witnesses attesting to the character or reputation of the respondent, which statements may not be filed.

Upon such submission, the Court will consider the same and (1) enter an order for the discipline conditionally agreed

to or (2) submit to the parties a proposed order for such discipline as the Court shall deem appropriate, or (3) notify the parties that it declines to indicate any disposition.

In the event an order is entered as set forth under (1) above, such order shall be a final disposition of the matter. In the event the Court submits a proposed order as set forth under (2) above, and the parties shall desire to agree to such disposition, they shall, within sixty (60) days following the submission of such proposed order, file with the Clerk a statement of agreement, verified by the respondent and by a member of the commission or the executive secretary thereof. Said statement of agreement shall reflect the prior conditional agreement, the prior action of the Court thereon and the agreement of the parties thereto. Upon such filing, the Court shall enter its order accordingly, which order shall be a final disposition of the matter. In the event the parties do not desire to agree to such proposed order or in the event the Court proceeds as set forth under (3) above, the parties shall proceed as if no conditional agreement had been filed.

It is the intent of this rule to encourage appropriate agreed dispositions of disciplinary matters. A conditional agree ment shall not be admitted into evidence at any hearing of the matter.

Section 12. Prosecution of Grievances

(a) In the event the commission determines that the misconduct, if proven, would warrant disciplinary action, the Executive Secretary shall prepare a verified complaint which sets forth the misconduct with which the respondent is charged and shall prosecute the case.

(b) The complaint shall be entitled "In the Matter of," naming the respondent. Six (6) copies shall be filed with this Court. The complaint may be verified on the basis of information and belief.

(c) Upon the filing of such complaint, a copy of the complaint shall be served upon the respondent by delivering a copy of the complaint to him personally or by sending a copy of the complaint by registered or certified mail with return receipt requested and returned showing the receipt of the letter.

In the event the personal service or service by registered or certified mail cannot be obtained upon any respondent attorney, said complaint shall be served on the Clerk of this Court as set forth below.

(d) Each attorney admitted to practice law in this State shall be deemed to have appointed the Clerk of this Court as his or her agent to receive service of any and all papers, processes or notices which may be called for by any provision of this rule. Such papers, process or notice may be served by filing the same with the Clerk of this Court as the agent for said attorney, together with an affidavit setting forth the facts necessitating this method of service. Upon receipt of such papers, process or notice together with such affidavit, the Clerk of this Court shall immediately mail such papers, process or notice to such attorney at the attorney's address as shown upon the records of the Clerk of this Court, and the Clerk shall make an affidavit showing the mailing of such papers, process or notice to said attorney. Upon the completion of this procedure, said attorney shall be deemed to have been served with such papers, process or notice.

Section 13. Hearing Officers

In addition to the powers and duties set forth in the rule, hearing officers shall have the power and duty to:

(a) Conduct a hearing on a complaint of misconduct within sixty (60) days after the hearing officer is appointed and has qualified;

(b) Administer oaths to witnesses;

(c) Receive evidence and make written findings of fact and recommendations to the Court; and

(d) Do all things necessary and proper to carry out their responsibilities under this rule.

Section 14. Proceeding Before the Hearing Officer

(a) The rules of pleading and practice in civil cases shall not apply. No motion to dismiss or dilatory motions shall be entertained. The case shall be heard on the complaint and an answer which may be filed by the respondent within thirty (30) days after notice of the filing of the complaint. An answer, if filed, may assert any legal defense. If the respondent shall elect to file an answer, he shall file six (6) copies with this Court. An answer need not be filed, in which case the complaint shall be taken as denied. A respondent may on a showing of good cause petition for a change of hearing officer within ten (10) days after the appointment of such hearing officer.

(b) The complainant and the respondent shall be given not less than fifteen (15) days written notice of the hearing date. The respondent shall have the right to attend the hearing in person, to be represented by counsel, to cross-examine the witnesses testifying against him and to produce and require the production of evidence and witnesses in his own behalf at the hearing, as in civil proceedings.

Either the Executive Secretary or the respondent may file with the hearing officer a motion to take depositions or a motion to produce certain documents or records, setting forth the reasons why such depositions should be taken or such records should be produced. The hearing officer may permit the taking of such depositions or may require the production of documents or records under such terms and conditions as he may deem proper. Such terms and conditions shall, as nearly as practicable, follow the Indiana Rules of Civil Procedure pertaining to discovery proceedings.

(c) At the discretion of the hearing officer, or upon the request of either party, a pre-hearing conference may be ordered for the purpose of obtaining admissions, narrowing the issues presented by the pleadings, requiring an exchange of the names and addresses of prospective witnesses and the general nature of their expected testimony, considering the necessity or desirability of amendments to the verified complaint and answer thereto, and such other matters as may aid in the disposition of the action.

(d) The complainant and the respondent shall be given not less than fifteen (15) days written notice of the hearing date. The respondent shall have the right to attend the hearing in person, to be represented by counsel, to cross-examine the witnesses testifying against him and to produce at the hearing and require the production of evidence and witnesses in his own behalf at the hearing, as in civil proceedings. All subpoenas or other proceedings and all notices connected with processing of such complaint shall be issued only under the direction of the hearing officer or hearing officers, and no other court or judicial officer of this State shall have jurisdiction to issue any orders or processes in connection with a disciplinary complaint.

(e) The proceedings may be summary in form and shall be without the intervention of a jury and shall be reported.

(f) Within thirty (30) days after the conclusion of the hearing, the hearing officers shall determine whether misconduct has been proven by clear and convincing evidence and shall submit to the Supreme Court written findings of fact. Recommendations concerning the disposition of the case may be made by the hearing officer in his discretion. A copy of said finding and any recommendations shall be served by the hearing officer on the respondent and the Executive Secretary of the disciplinary commission at the time of filing same with the Supreme Court.

(g) If there has been a determination of reasonable cause as set forth under 11(c), and if the complaint states facts constituting such reasonable cause, the hearing officer or officers may, upon motion of the disciplinary commission, issue a rule against the respondent to show cause why he should not be suspended pending final determination of the cause and fixing a time and place certain for hearing thereon, which shall be not less than fifteen (15) days after service of notice thereof, if by personal service, and not less than twenty (20) days after mailing, if by certified or registered mail. Procedure at the hearing upon such rule to show cause shall be the same as provided herein for hearing upon the complaint and answer, except the burden of proof shall be upon the respondent. If the respondent, in the opinion of the hearing officer or officers shall fail to sustain such burden of proof, the hearing officer or officers shall submit to this Court a written recommendation whether or not the respondent be suspended pending final determination of the cause.

Section 15. Supreme Court Review

(a) The respondent or Commission shall have thirty (30) days after the filing of the hearing officer's finding and recommendation to petition for a review of the same before the Supreme Court. If no petition for review is filed within thirty (30) days of the finding and recommendation of the hearing officer the Supreme Court shall enter judgment or such other appropriate order in the premises.

(b) Upon receipt of written recommendation for suspension, pending final determination of the cause, this Court may forthwith enter an order of suspension thereon. Respondent shall have fifteen (15) days thereafter to petition this Court for a review and a dissolution of such order.

(c) In the event a party does not concur in a factual finding made by the hearing officer and asserts error in such finding in the petition for review, such party shall file with the

petition for review a record of all the evidence before the hearing officer relating to this factual issue. Within thirty (30) days of the filing of the transcript, opposing parties may file such additional transcript as deemed necessary to resolve the factual issue so raised in the petition for review. Any transcript filed must be settled, signed and certified as true and correct by the hearing officer. The fee paid for procuring a transcript or additional transcript shall be included in the costs of the disciplinary proceeding.

(d) The respondent or Commission may file a brief at the time a petition for review is filed. Opposing parties shall have thirty (30) days from the filing of the petition for review to file a brief. The party filing the petition for review shall then have fifteen (15) days to file a reply brief. The brief filed under the provisions of this rule need not conform to the rules of appellate procedure adopted by this Court.

* * *

APPENDIX L

INDIANA RULES OF TRIAL PROCEDURE
(West 1993)

Rule 4.4. Service Upon Persons in Actions for Acts Done in This State or Having an Effect in This State

(A) Acts Serving as a Basis for Jurisdiction. Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:

(1) doing any business in this state;

(2) causing personal injury or property damage by an act or omission done within this state;

(3) causing personal injury or property damage in this state by an occurrence, act or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state;

(4) having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state;

(5) owning, using, or possessing any real property or an interest in real property within this state;

(6) contracting to insure or act as surety for or on behalf of any person, property or risk located within this state at the time the contract was made; or

(7) living in the marital relationship within the state notwithstanding subsequent departure from the state, as

to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state.

(B) Manner of service. A person subject to the jurisdiction of the courts of this state under this rule may be served with summons:

(1) As provided by Rules 4.1 (service on individuals), 4.5 (service upon resident who cannot be found or served within the state), 4.6 (service upon organizations), 4.9 (in rem actions); or

(2) The person shall be deemed to have appointed the Secretary of State as his agent upon whom service of summons may be made as provided in Rule 4.10.

(C) More convenient forum. Jurisdiction under this rule is subject to the power of the court to order the litigation to be held elsewhere under such reasonable conditions as the court in its discretion may determine to be just.

In the exercise of that discretion the court may appropriately consider such factors as:

(1) Amenability to personal jurisdiction in this state and in any alternative forum of the parties to the action;

(2) Convenience to the parties and witnesses of the trial in this state in any alternative forum;

(3) Differences in conflict of law rules applicable in this state and in the alternative forum; or

(4) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

APPENDIX M

IN THE SUPREME COURT
OF THE STATE OF INDIANA

Cause No. 98S00-9303-DI-309

In the Matter of JOHN P. COALE,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CHARGES OF THE DISCIPLINARY COMMISSION

Comes now the Respondent, John P. Coale, and hereby answers the charges of the Indiana Disciplinary Commission of the Indiana Supreme Court.

As set forth below, the Hearing Officer should dismiss the complaint against Mr. Coale before consideration on the merits due to the numerous procedural and substantive defects that have characterized and tainted these proceedings from the outset.[1] In the event the Hearing Officer proceeds to a merits determination, notwithstanding the incurable constitutional and other flaws in the process and substance of the charges against Mr. Coale, Respondent submits that the charges against him must be dismissed for the Commission's failure to meet its burden of proof.

---

[1] Many of the legal arguments raised by Respondent below have been raised previously, before either the Hearing Officer or the Supreme Court of Indiana. Previously, the Hearing Officer took the position that he was without authority to rule on Respondent's legal arguments and referred all such matters to the Indiana Supreme Court. While the Hearing Officer may continue to take the position that he may not rule on Respondent's legal arguments, or that the same have already been ruled upon, Respondent raises them anew in order to preserve for the appellate record all of his objections to these proceedings.

I. THESE PROCEEDINGS VIOLATE RESPONDENT'S RIGHT TO DUE PROCESS UNDER THE LAW BECAUSE THE COURT THAT ULTIMATELY WILL DECIDE THIS MATTER IS THE ENTITY THAT DEMANDED THE PURSUIT OF DISCIPLINARY CHARGES AGAINST RESPONDENT

As the record in the case reveals, the Chief Justice of the Indiana Supreme Court, the highest ranking judicial officer in the entire State of Indiana, is the true complainant against Respondent. On March 9 1992, Chief Justice Randall T. Shepard, together with Justice Brent E. Dickson, held a press conference during which they demanded an investigation into the conduct of Mr. Coale and other attorneys in connection with the alleged acts of solicitation that are the subject of the Verified Complaint against Respondent. *See Respondents' Objection to Intended Procedure and Memorandum in Support*, filed June 11, 1993.

Following the filing of the Verified Complaint, Respondent promptly requested that the Chief Justice and Justice Dickson recuse themselves from hearing this matter because of their publicly expressed bias against Respondent and their role in having charges brought against Respondent.[2] *See Respondents' Objection to Intended Procedure.* This request was denied by Order of the Chief Justice dated June 25, 1993.

The conduct of the Chief Justice and Justice Dickson not only violated the Indiana Code of Judicial Conduct, Canons 2 and 3, but, more importantly, made it impossible for Mr. Coale to receive due process. It is axiomatic that due process requires a tribunal that is impartial in fact and appearance.

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal

---

[2] No private citizen ever filed a complaint with the Indiana Disciplinary Commission against Respondent.

> cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness . . .

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980)(citations omitted). After the Chief Justice and Justice Dickson held a press conference for the express purpose of publicly commenting in a negative fashion upon Respondent's alleged conduct, calling for an investigation into and an "aggressive posture" towards such conduct, the State's highest court was no longer the neutral tribunal that due process demands.

Even if the Indiana Supreme Court could judge this matter without bias, it could not do so without the appearance of bias, as due process requires. "[J]ustice must satisfy the appearance of justice . . . and this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties." *Id.* at 243 (citations omitted). The public conduct of the Chief Justice and an Associate Justice of the Indiana Supreme Court in connection with these proceedings have manifested a bias against Respondent and tainted the proceedings with, at a minimum, the appearance of partiality. In Indiana, the Supreme Court is the "ultimate fact finder in an attorney disciplinary proceeding." *In re Moore*, 453 N.E.2d 971 (Ind. 1983). The Court cannot dispense even-handed justice when it fills simultaneously the role of complainant and fact-finder, particularly when its sitting Chief Justice publicly expresses a bias against

one of the parties. Because there is no other tribunal in the State of Indiana that may hear this matter[3] due process is not possible and all charges against Respondent should be dismissed.

II. NEITHER THE INDIANA SUPREME COURT NOR ITS DISCIPLINARY COMMISSION HAVE JURISDICTION OVER THE CONDUCT OF RESPONDENT WHO IS NOT A MEMBER OF THE BAR AND HAS NEVER PRACTICED LAW IN THE STATE OF INDIANA

The Indiana Supreme Court's attempt to exercise jurisdiction over Mr. Coale does not comport with its own rules of procedure or with the due process clause of the United States Constitution. Mr. Coale is not a member of the Indiana Bar, nor is there any evidence that has he ever appeared before any Indiana court. Moreover, the minimum contacts needed to support a constitutionally valid exercise of "long-arm" jurisdiction by the court are not present.

Admission and Discipline Rule 23 describes the jurisdiction of the Indiana Supreme Court with regard to disciplinary proceedings: "This court has exclusive jurisdiction of all cases in which an attorney who is admitted to the bar of this court or who practices law in the state (hereinafter referred to a "attorney") is charged with misconduct." Neither of the foregoing bases can justify the attempt to exercise jurisdiction over Respondent. It is undisputed that Mr. Coale is not admitted to the bar of the State of Indiana and the record is devoid of any evidence that Mr. Coale has ever appeared before any Indiana court or otherwise practiced or practices

---

[3] By this statement, Respondent does not concede or suggest that the Indiana Supreme Court has jurisdiction to hear this matter. As set forth infra at pages __, even if the Court could judge this matter with the appearance and reality of impartiality, it would not have the jurisdiction to do so.

law in the State of Indiana. The record shows only that Respondent's law firm sent letters and brochures from their offices in Washington, D.C. to five persons individuals who were alleged to be residents the survivors or the families of deceased victims of a plane crash. There is no evidence or allegation that the informational materials sent by Respondent's firm contained legal advice; nor is there any evidence or allegation that the materials in question were directed to the merits of any potential claim or recommended course of action. On the contrary, the allegation is that those materials were advertisements that promoted Respondent's law firm. To characterize the sending of five informational packages as the "practice of law" is to stretch the bounds of that definition beyond recognition. By its own rules, the Indiana Supreme Court lacks jurisdiction over this matter and over Mr. Coale.

Even if the Indiana Supreme Court interpreted its jurisdiction in such a way as to reach the mailing of letters from Washington, D.C. by a Washington, D.C. law firm, neither Indiana's long arm statute (Trial Rule 4.4), nor the due process clause of the United States' Constitution would permit the exercise of jurisdiction upon the facts alleged here. All that has been alleged with regard to Respondent is that Respondent's Washington, D.C. firm sent 5 letters, and enclosures, to certain named persons and that such letters and enclosures constituted "advertising materials." It has not even been alleged, or proven, that the individuals in question were residents of the State of Indiana. The law of Indiana is clear that such limited activity related to the forum is insufficient to establish minimum contacts. *Rosowsky v. University of Colorado*, 653 N.E.2d 146 (Ind. App. 1995) (interstate letters and phone calls do not subject non-resident to jurisdiction in the state of the person receiving letters and calls). *See also Brokemond v. Marshall Field & Co.*, 612 N.E.2d 143 (Ind. App. 1993) (advertising in Indiana, delivering merchandise to Indiana, collecting state sales tax, and distributing credit cards within Indiana insufficient to confer

jurisdiction upon Indiana court). There is no allegation that Respondent ever traveled to Indiana to meet with anyone, nor is there any allegation that Respondent or his firm actually obtained any business as a result of the letters. Even where non-resident defendants *have* sold goods in Indiana and traveled to Indiana for business meetings, where that activity was minimal the courts of Indiana have refused to exercise jurisdiction. *See e.g. L.H. Carbide Corp. v. Piece Maker Co.*, 852 F.Supp. 1425 (N.D. Ind. 1994) (where scant number of defendant's customers resided in Indiana, transactions conducted with these customers insufficient to satisfy limitations imposed by Due Process Clause of Fourteenth Amendment); *Protective Insurance Co. v. Cody*, 882 F. Supp. 782 (S.D. Ind. 1995) (where defendant's only deliberate contact with Indiana was the existence of employment contract between defendant and an Indiana based corporation, assertion of personal jurisdiction would not comport with fair play and substantial justice. Here, the contacts between Mr. Coale and the forum are even less than those in the cited cases and are patently insufficient to support a constitutionally valid exercise of personal jurisdiction.

III. THESE PROCEEDINGS VIOLATE RESPONDENT'S RIGHT TO DUE PROCESS UNDER THE LAW BECAUSE OF THE INORDINATE DELAY OF NINE YEARS BETWEEN THE ALLEGED EVENTS AS DESCRIBED IN THE COMPLAINT AND THE HEARING ON THE CHARGES

As set forth fully in Respondent's previously-filed Verified Memorandum in Support of Motion to Dismiss All Charges, the extreme and inexcusable delay in bringing this matter to a conclusion has eliminated the possibility of a fair process (to the extent that fairness ever was possible in light of the above). Respondent reasserts, relies upon and incorporates by reference all arguments made in his previously filed Memorandum.

IV. RULES 7.1(B) AND 7.1(D)(5) VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Rules 7.1 (b) and 7.1 (d)(5) violate Mr. Coale's right to due process under the law because they do not provide reasonable notice of what conduct is prohibited. "A regulation that 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process.'" *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 665 (Marshall, J. concurring in part, dissenting in part)(*quoting Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). To comport with the requirements of due process, a regulation must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). "The general test of vagueness applies with particular force in review of laws dealing with speech. '(S)tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.'" *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (*quoting Smith v. California*, 361 U.S. 147, 151 (1959)).

Rule 7.1(b) prohibits the use of statements or claims in advertising that are "unfair" yet the Rule makes no effort to delineate how the concept of fairness is to be applied. Where, as here, the statements at issue are factually accurate and truthful, the Rule provides no guidance as to how "fairness" is to be judged or to whom the statement must be "fair" (*i.e.* the recipient, other attorneys). This amorphous prohibition is unconstitutionally vague and cannot be enforced consistent with due process.

Rule 7.1(d)(5) of the Indiana Rules of Professional Conduct employs a similarly vague standard that prohibits lawyer advertising that "appeals primarily to a lay person's fear, greed, desire for revenge or other similar emotion." This inherently subjective language presents a standard that requires an attorney to read the minds of the intended recipient before sending an advertisement. It is simply not possible for an attorney, or the Disciplinary Commission, to determine whether an advertisement appeals to a certain emotion in an intended recipient. There are no objective criteria by which an attorney who wants to send an advertisement may determine whether the advertisement offends this rule.[4] *See Haynes, supra*, 425 U.S. at 621 (regulation restricting door-to-door canvassing void for vagueness under Due Process Clause because coverage of the ordinance unclear). Accordingly, because Rule 7.1(d)(5) fails to give reasonable notice of what conduct is prohibited, the Fourteenth Amendment forbids its enforcement.

V. INDIANA RULES OF PROFESSIONAL CONDUCT 7.1(b), 7.1(d)(2), 7.1(d)(3), AND 7.1 (d)(5) VIOLATE THE FIRST AMENDMENT

A. *Rules 7.1(b) and 7.1 (d)(5) of the Indiana Rules of Professional Conduct Are Unconstitutionally Vague Restrictions on Protected Speech*

Rule 7.1(b) of the Indiana Rules of Professional Conduct prohibits attorneys from using advertising materials that contain "false, fraudulent, misleading, deceptive, self-laudatory or unfair statements or claims." While the State legitimately seek to protect its citizens from advertising that is "false,

---

[4] As set forth below, the vagueness of this standard also runs afoul of the First Amendment for the same reason: It allows the State to restrict lawful speech using nothing more than an purely subjective yardstick that presupposes to know the emotional makeup of all the citizens of Indiana.

fraudulent, misleading [and] deceptive," the remaining provisions of Rule 7.1(b) are unreasonable and impermissibly vague restrictions on protected speech.

As described above, Rules 7.1(b) and 7.1 (d)(5) suffer from the constitutional infirmity of vagueness, which implicates both the due process and free speech rights of Respondent. The State's use of vague terms in setting forth its restrictions on commercial speech by attorneys violates the First Amendment in two ways: by running afoul of the requirement that the restriction must be narrowly drawn and tailored to its stated objectives and by creating a nebulous standard by which the State may decide whether the restriction has been violated.

"[I]n the First Amendment area 'government may regulate . . . only with narrow specificity.'" *Hynes, supra*, 425 U.S. at 620 (*quoting NAACP v. Button*, 371 U.S. 415, 433(1963)). To determine whether the State has legislated with the requisite specificity, the court must examine the relationship between the interests that the State seeks to serve by restricting speech and the means chosen to serve that interest. *Florida Bar v. Went for It*, 515 U.S. 618, 624 (1995). In the commercial speech context, the means need not be the least restrictive but must be reasonable and "narrowly tailored to achieve the desired objective." *Id.* Assuming that the State's objective is to protect its citizens from overreaching or undue influence, a ban on speech that is "unfair" or might appeal to certain emotions is not narrowly drawn to accomplish that objective. *Compare Went For It, supra*, 515 U.S. at 632-633 (rule against contacting accident victims for 30 days after accident was short temporal ban, narrow in scope and duration).

The undefined and undefinable standard for determining whether a statement or claim is "unfair" makes enforcement of Rule 7.1(b) a matter of pure subjectivity. Rule 7.1(b) necessarily makes the State of Indiana the arbiter of what is

fair and permits the State to employ an undisclosed, subjective standard by which to make that judgment. Similarly, with regard to Rule 7.1(d)(5), it is not possible to establish objective criteria by which to determine whether an advertisement "appeals" primarily to a certain emotion, nor does the State attempt to do so. Nowhere in its Rules does the State of Indiana define the standard by which the State will judge whether the advertisement in question appeals to 'fear, greed, desire for revenge or other similar [undefined] emotion,' nor is such a definition possible. Apparently, whether an advertisement runs afoul of Rules 7.1(b) and 7.1 (d)(5) is a matter committed solely to the personal opinion of the State official reviewing the material. The First Amendment does not permit the State to restrict constitutionally protected speech in this fashion; indeed, it is exactly this type of restriction that the First Amendment was designed to protect against.

A regulation that restricts the right to engage in protected speech by employing vague terms, subject to unguided interpretation by State officials, cloaks State officials with the authority to permit or prohibit speech based on nothing more than their own subjective opinions and beliefs. This the First Amendment does not allow. *See Hynes, supra*, 425 U.S at 622 (ordinance that did not provide explicit standards for those who apply it gave police effective power to grant or deny permission to speak and was void for vagueness); *cf. Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) (ordinance that makes enjoyment of First Amendment rights contingent on uncontrolled will of state official is unconstitutional censorship or prior restraint on freedom of expression); *Zauderer, supra*, 471 U.S. at 666, n. 10 (noting that "in addition to ensuring fair notice, vagueness doctrine also guards against harsh and discriminatory enforcement" and raising the possibility that "vague disciplinary rules have been used as a tool for singling out unorthodox and unpopular attorneys for sanction) (Marshall, J., concurring in part, dissenting in part). Where the language of a restriction on

speech "does not provide the kind of precision which is required in statutes effecting first amendment interests" and fails to give notice of what specific conduct will violate the restriction, it violates both the First and the Fourteenth Amendment *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 155 (7th Cir. 1990)

1. *The First Amendment Does Not Permit the State to Ban the Use of "Self-Laudatory" Statements*

The purpose of commercial speech is to further some commercial transaction by promoting the speaker. By its very definition, to advertise is to "call public attention to esp. by emphasizing desirable qualities so as to arouse a desire to buy or patronize." Webster's New Collegiate Dictionary (1975). By prohibiting statements or claims that are "self-laudatory" the State seeks to ban attorney advertising *qua* advertising.

On two occasions the United States Supreme Court has suggested that a ban on self-praise or self-recommendation cannot pass constitutional muster. First, in *Zauderer, supra*, the Court noted that "[b]ecause all advertising is at least implicitly a plea for its audience's custom, a broad reading of the rules applied by the Ohio court (and particularly the rule against self-recommendation) might suggest that they forbid all advertising by attorneys—a result obviously not in keeping with our decisions in *Bates* and *In Re R.M.J.*" *Zauderer, supra*, 471 U.S. at 639. The Court then went on to find that Ohio's restriction on self-recommendation was unacceptable as applied to truthful information contained in Zauderer's advertisement and struck that provision down on First Amendment grounds. *Id.* at 646-647.

Three years after *Zauderer*, the Court in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 488 (1988) had occasion to consider whether the State might constitutionally ban the use of language that stated "no affirmative or objective fact but

constitutes pure salesman puffery." *Shapero, supra*, 486 U.S. at 479. Significantly, the Court unequivocally rejected the State's argument that such statements by an attorney were not protected by the First Amendment. In so holding, the Court stated that "[T]he pitch or style of a letter's type and its inclusion of *subjective predictions of client satisfaction* might catch the recipient's attention more than would a bland statement of purely objective facts in small type. [But] so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient." *Id.* (emphasis added).

Because all advertisements are by the very nature self-praise, the State may not, consistent with the First Amendment, prevent attorneys from making statements that might be construed as self-laudatory. Moreover, where, as here, there is no showing that the statements are in any way false or deceptive, the State has asserted no substantial interest that would be directly advanced by this restriction.

B. *Rules 7.1(d)(2) and 7.1 (d)(3) Are Facially Invalid Under the First Amendment as Absolute Prohibitions on Certain Types of Information*

The United States Supreme Court, on numerous occasions, has made it abundantly clear that "the States may not place an absolute prohibition on certain types of potentially misleading information . . . if that information may be presented in a way that is not deceptive." *In Re R.M.J.*, 455 U.S. 191, 203 (1982); *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 469 U.S. 91, 110 (1990) (State may not completely ban statements that are not actually or inherently misleading). Rule 7.1 (d)(2), which prohibits advertising material that "contains statistical data or other information based on past performance or prediction of future success," and Rule 7.1 (d)(3), which prohibits advertising material that "contains a

testimonial or endorsements of a lawyer," fly directly in the face of Supreme Court precedent and run afoul of the First Amendment

In the absence of a showing that the banned speech is actually or inherently misleading, Rules 7.1 (d)(2) and (d)(3) cannot withstand constitutional scrutiny. There is nothing inherently misleading about statistical data, information based on past performance or prediction of future success, or testimonials or endorsement of a lawyer. Indeed, the materials banned by Indiana's Disciplinary Rules are perhaps the most common forms of commercial speech in the United States.[5] As long as the advertisement is truthful, the State may not, consistent with the First Amendment, flatly prohibit advertising material that includes the information described in Rules 7.1(d)(2) and (d)(3).

VI. THE DISCIPLINARY COMMISSION HAS NOT MET ITS BURDEN OF PROOF AND THE CHARGES AGAINST RESPONDENT MUST BE DISMISSED

Even assuming that jurisdiction is properly asserted over Mr. Coale and that the Indiana Rules of Professional Conduct pass constitutional muster, the Disciplinary Commission has failed to meet its burden of proof in these proceedings. The Verified Complaint filed jointly against Mr. Coale and his former partner Phil Allen alleges violations of Rule 7.1(b), Rule 7.1 (d)(2), Rule 7.1(d)(3), Rule 7.1(d)(5), Rule 7.3(c), Rule 8.4(a) and Rule 8.4(d). Also alleged is that Mr. Coale and Mr. Allen engaged in the unauthorized practice of law.

---

[5] For example, many television commercials feature claims that a product is x% larger or stronger or more effective. Similarly, endorsements and testimonials regarding advertised products and services regularly fill the airwaves.

Not one of these allegations has been proven by clear and convincing evidence as required in these proceedings. *See In Re Seigel*, 708 N.E.2d. 869, 870 (1999).

Disciplinary Counsel has elected to rest on the pleadings in this case. By agreement of the parties, the hearing on this matter was waived and both parties have accepted the Verified Complaint and the "Answer of Respondents" as the exclusive source of evidence upon which findings may be made by the Hearing Officer. Neither of those documents, alone or together, establishes the elements of any of the violations with which Mr. Coale is charged.

A. *The Disciplinary Commission Has Failed to Specify How Respondent's Alleged Conduct Violated Indiana's Disciplinary Rules*

As an initial matter, Respondent notes that the neither the Verified Complaint nor the Disciplinary Commission's brief gives notice of the exact charges against Respondent. The Verified Complaint and the Commission's Brief both recite the rules but fail to elaborate which provision of the rule applies and how Respondent allegedly violated the provision in question. Rule 7.1(b) proscribes the use of statements or claims that are "false, fraudulent, misleading, deceptive, self-laudatory or unfair." The Commission has never specified how the alleged mailing from Respondent's firm ran afoul of Rule 7.1(b), *i.e.* whether it was false, misleading, deceptive, self-laudatory, or unfair or suffered from some combination of those five defects. More importantly, the Commission has never specified the manner in which the materials were allegedly false, misleading, deceptive, self-laudatory or unfair.

The charge that Respondent violated Rule 7.1 (d)(2)'s ban on the use of "statistical data or other information based on past performance or prediction of future success" is similarly vague for its failure to identify which of the three offending

types of information is allegedly included within the material allegedly sent by Respondent's firm. Finally, to which emotion does the advertising material at issue appeal: "fear, greed, desire for revenge, or similar emotion" and what specific language in the material appeals to one or more of those emotions? In nine years, these questions have never been answered and remain unanswered even after the filing of the Commission's Brief.

Without knowing the specifics of the charges against him, Mr. Coale is severely hampered in his defense of this action. Indeed, the due process arguments regarding the vagueness of the statutory scheme are exemplified by these proceedings against Respondent, who is forced to blindly defend against vague and unspecified charges of misconduct. Where, as here, there is an absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges, so that the attorney is not given a meaningful opportunity to defend, the proceedings violate due process. *In re Ruffalo*, 390 U.S. 544, 522 (1968).

B. *The Disciplinary Commission Has Failed to Prove that Respondent Coale Performed Any of the Acts that Form the Basis for The Charges*

The only evidence in this record is the joint, unverified, Answer of Respondents John Coale and Philip Allen. In that Answer it is admitted that informational materials concerning Respondent's law firm were sent to certain named individuals, that the informational materials in question contained the statements quoted in the Verified Charges, and that the informational materials did not bear the words "Advertising Materials." *See Commission's Recitation of Admissions in Lieu of Final Hearing*, pp. 3-5, 7-9. None of this evidence is sufficient to establish any wrongdoing by Respondent John Coale.

Disciplinary proceedings are, by their very nature, individual proceedings against individual attorneys. As such, theories of vicarious liability may be not be used to establish misconduct. There must be clear and convincing evidence that the individual attorney in question committed the charged act, or acts, of misconduct. The evidentiary record in this proceeding, which consists of the Verified Complaint and the Answer contains no evidence that John Coale did anything. The Answer establishes only that the materials sent by Respondent's law firm did not contain any indication that they were advertising materials, that they were not filed with the bar and that they contained certain quoted statements. The evidentiary record does not reflect from whom the materials were allegedly sent—whether Coale, Allen or some third party—and, therefore, fails to establish who, if anyone, is guilty of the misconduct charged.[6] This evidentiary flaw is fatal to all of the Commission's allegations.

In addition, for the reasons previously stated in Respondent's Motion to Withdraw Answer of John P. Coale, the Answer of Respondents should not be considered as evidence against John Coale. With regard to this issue, Respondent relies upon his previously submitted Motion and Memorandum and incorporates the same by reference.

C. *The Disciplinary Commission Has Failed to Meet Its Burden of Proving the Applicability of Rule 7.3 (c)*

As a threshold matter, the Disciplinary Commission has failed to prove that the requirements of Rule 7.3(c) applied to the informational materials sent by Respondent's firm.

---

[6] Any argument that Respondent is guilty of misconduct because he was a partner must fail. Just as all the partners at a 400 lawyer firm could not be disciplined for the conduct of one partner, so the partner of a small firm may not be disciplined for the conduct of an (unidentified) individual affiliated with the firm.

Rule 7.3(c) requires that advertising material sent by attorneys to prospective clients must be filed with the Disciplinary Commission prior to or at the time of mailing and that they must bear the words "advertising material"; however, Rule 7.3 (c) applies only to materials that are sent to individuals "with whom the lawyer has no family or prior professional relationship." Disciplinary Commission has neither alleged nor proven that Respondent's firm had no prior personal or professional relationship with the named individuals. Accordingly, since the Disciplinary Commission has failed to establish that Rule 7.3(c) applied to Respondent's alleged conduct in the first instance it has necessarily failed to establish a violation of Rule 7.3(c).

There is no evidence in the record of these proceedings from which the Hearing Officer may conclude that Mr. Coale had no prior family or professional relationship with the listed individuals. The burden is on Disciplinary Counsel to prove each and every element of the violations charged by clear and convincing evidence. The clear and convincing standard is a stringent one that cannot be met through conjecture or speculation. The Verified Complaint is silent as to Mr. Coale's relationship, or lack thereof, with the named individuals and the Answer is similarly silent. isciplinary Counsel has failed to adduce any evidence that the requirements of Rule 7.3 are applicable to the materials in question, a necessary element of proving a violation of Rule 7.3.

D. *The Disciplinary Commission Has Failed to Prove that The Material Allegedly Sent by Respondent's Firm to the Individuals Named in the Verirfied Complaint Is False, Fraudulent, Misleading, Deceptive, Self-Laudatory or Unfair*

The record in this case is devoid of any evidence that the statements made in the Coale, Allen & Van Susteren firm brochure (the "brochure") were false, fraudulent, misleading

or deceptive and, as set forth above, the Commission has not specified the language upon which it bases this charge.

The truth or falsity of a statement is a matter of fact, capable of objective proof. The Commission has presented no evidence that contradicts any of the factual assertions contained in the brochure and thus has failed to prove, by *any* evidence, that the materials were false or fraudulent.[7]

Similarly, the Commission has both failed to specify what is "misleading" or "deceptive" about the materials in question and failed to offer any evidence in to support those allegations (if in fact those allegations are being made, see Section VI.A, *supra*). Recognizing the fatal flaw in its position, the Commission attempts to argue that the provisions of Rule 7.1(d)(2), (3) and (5) "merely enunciate specific acts that in addition to subsection (b) have been determined by the Indiana Supreme Court to constitute lawyer advertising practices that are false, misleading and deceptive." *Commission's Brief*, p. 8. Apparently, the Commission assumes that it has met its burden of proving violations of Rule 7.1(d) and argues that, therefore, it has also proven the alleged violations of Rule 7.1(b). However, the Commission cites no authority for the proposition that a violation of Rule 7.1(d) automatically constitutes a violation of Rule 7.1(b), nor can it, because the Disciplinary Rules do not support the interpretation urged by the Commission

The Commission's argument is belied by Rule 7.1(c). Rule 7.1(c) sets forth a non-exhaustive list of statements or claims that are deemed to be "false, fraudulent, misleading, deceptive, self-laudatory or unfair."[8] In order to accept the

---

[7] Proof of "fraudulent" conduct necessarily requires proof of a false statement of fact. See e.g. Black's Law Dictionary, definition of "fraud" and "fraudulent."

[8] Rule 7.1(c) states as follows: "Without limitation, a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim includes

interpretation urged by the Commission, the Court would have to assume that, having used Rule 7.1(c) to specify statements and claims that would violate Rule 7.1(b), the drafters of the Disciplinary Rules inexplicably elected to continue that list in a separate subsection, subsection 7.1(d), without any reference to Rule 7.1(b). To invoke such a statutory construction would be to employ tortured logic indeed.

Finally, the Commission has not specified the manner in which the materials sent by Respondent's firm were self-laudatory or unfair, nor has it proven that the materials in question can be characterized as such. As described above, the term "unfair" is so vague as a general proposition that it is impossible to know what it prohibits. In the specific context of this case, no details have been provided to enable Mr. Coale to understand the nature of the "unfairness" charge or whether it has even been made; accordingly, Mr. Coale cannot respond to this allegation.

Leaving aside the constitutional difficulties with a ban on "self-laudatory" advertising materials, it has not been proven that the materials in question were self-laudatory. The Commission relies solely upon its recitals as to what appeared in the brochure and expects that the Respondent and the Court will be able to identify those statements and claims it

---

a statement or claim which: (1) contains a material misrepresentation of fact; (2)omits to state any material fact necessary to make the statement, in light of all circumstances, not misleading; (3) is intended to or is likely to create an unjustified expectation; (4) states or implies that a lawyer is a certified or recognized specialist other than as permitted by Rule 7.4; (5) is intended to or likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal or other public body or official; (6) contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or to be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive."

contends are self-laudatory. An examination of those recitals sheds no light on the Commission's case in this regard. In order to qualify as self-laudatory, a statement or claim, obviously, must praise the maker of the statement or claim. The materials quoted by the Commission contain no such praise. Indeed, the only subjective claim that is made concerning the Respondents is that they have a "passion for combat" and a "pure zest for competitiveness." While certainly any client wants a lawyer who will fight and compete, a statement or claim that the lawyer in question *enjoys* fighting and competing hardly qualifies as self-praise. Nowhere in any of the quoted material is any statement or claim made concerning the quality of Respondents work or their lawyering abilities. For example, there is no language stating or suggesting that Respondents are the best at what they do, the most skilled, better than other lawyers, more talented, or in any way subjectively superior. *See e.g. In re Wamsley*, 725 N.E.2d 75 (Ind. 2000) (statement that lawyer could get "best possible settlement" in "least amount of time"). Essentially, the brochure states no more than the claim that Respondents like a good fight.

E. *The Disciplinary Commission Has Failed to Prove that Respondent Engaged in the Unauthorized Practice of Law in Indiana*

Count II of the Verified Complaint against Respondent and his former partner alleges that "Respondents, by their aforesaid conduct, engaged in acts constituting the practice of law in Indiana." *Commission's Recitation of Admissions in Lieu of Final Hearing*, p. 9. The Commission cites no authority for the proposition that sending letters from Washington, D.C. to five individuals, none of whom have been identified as residents of the State of Indiana, constitutes the "practice of law in Indiana." Neither the Commission, nor the Court, can turn the act of corresponding by mail into the practice of law by simply stating it is so.

Even if it could be assumed that the named individuals are residents of Indiana, which assumption has no basis in the evidence of record, the mailing of a letter to a prospective client does not by itself constitute the practice of law. There is no allegation, and no evidence, that the materials sent to the five named individuals contained any type of legal advice or recommended course of action. Nor is there any allegation or evidence that the materials sent to the five named individuals discussed their specific situations. Under the circumstances, to call the mailing of informational materials about a law firm—not about a specific case and not containing legal advice—the "practice of law" is to stretch the boundaries of that definition beyond recognition and reason.

CONCLUSION

Wherefore and for all the foregoing reasons Respondent John Coale submits that the charges against him should be dismissed with prejudice.

Respectfully Submitted,

/s/ Robert Hammerle
ROBERT HAMERLE, Esq.
HAMMERLE & ALLEN
501 Indiana Ave.
Indianapolis, IN. 46202
(317)630-0137

/s/ Diane Cooley
DIANE COOLEY
COALE, COOLEY, LIETZ,
MCINERNY, P.C.
818 Connecticut Ave., NW,
Suite 857
Washington, D.C. 20006
(202)887-4770